(23,693)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 174.

KAPIOLANI ESTATE, LIMITED, APPELLANT,

vs.

MARY H. ATCHERLEY, LYLE A. DICKEY, AND E. M. WATSON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 7, 1914.

1 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

KAPIOLANI ESTATE, LTD., a Joint Stock Company, Plaintiff,
vs.
MARY H. ATCHERLEY, Defendant.

Injunction.

To Mary H. Atcherley, Greeting:

Whereas a bill in equity has been filed in this Court by the Kapiolani Estate, Ltd., against you, wherein the said Kapiolani Estate, Ltd., sets forth that you are the holder of the bare legal title as Trustee for it, as the beneficial owner of certain property hereinbelow mentioned; and further sets forth that you have begun an action of ejectment in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, wherein you seek to recover possession of the said lands, and that in so doing you are striving to take an unconscionable advantage of your possession of said bare legal title; and further sets forth that it has no plain, complete and adequate remedy at law; and asks that a temporary injunction may issue against you to restrain you, your counsellers, solicitors, attorneys and agents, from proceeding further with the said action of ejectment until the further order of this Court, and

Whereas I, the First Judge of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, sitting at Chambers in equity, am satisfied that a sufficient showing has been
2 made to justify the issuance of the injunction prayed for, and

Whereas an approved bond in the sum of $3,000 has been duly filed by the said Kapiolani Estate, Ltd.,

Now therefore you, your counsellors, solicitors, attorneys and agents, and each and all thereof, are hereby enjoined, under a penalty of being adjudged guilty of contempt of Court, from proceeding further with that certain action of ejectment begun by you on or about June 30th, A. D. 1901, as plaintiff, against the Kapiolani Estate, Ltd., as defendant, wherein you seek to recover possession of that certain piece or parcel of land situate at or near the corner of Queen and Punchbowl streets in the city of Honolulu, Territory of Hawaii, together with damages for its detention in the sum of $5,000, until the further order of a Judge of this Court sitting at Chambers in Equity.

And hereof fail not.

By the Court: GEORGE LUCAS, *Clerk.*

Dated, Honolulu, Territory of Hawaii, February 1st, A. D. 1902.

Endorsed: In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. Kapiolani Estate, Ltd., vs. Mary H. Atcherley. Injunction. Filed Feb'y 1st, 1902. George Lucas, Clerk.

1—174

3 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

KAPIOLANI ESTATE, LIMITED, Plaintiff,
vs.
MARY H. ATCHERLEY, Defendant.

Bill for Injunction.

Stipulation.

Whereas it is the desire of both Counsel for Plainuff and Defendant herein that the question of res judicata under the proceedings in equity set up in Plaintiff's bill of complaint herein be first adjudicated and settled, thereby determining whether further litigation between the parties hereto is necessary or not;

Now therefore, to effectuate the premises it is hereby stipulated between the parties hereto as follows, the Court consenting.

That the amended bill of complaint filed with this stipulation be substituted for the original bill of complaint on file in this cause and that defendant be allowed to withdraw her answer now on file in this cause and that defendant file a general demurrer to said amended bill of complaint, setting up that said bill of complaint constitutes no cause of action;

That thereupon a decree pro forma sustaining said demurrer be made and dismissing plaintiff's amended bill of Complaint
4 without prejudice to plaintiff's right to file another bill of complaint against the defendant setting up any and all matters whatsoever as it, the plaintiff, may see fit, excepting only matters constituting res judicata as set up in the amended bill of complaint herein, and that thereupon plaintiff shall appeal from said decree to the Supreme Court, it being further stipulated between the parties hereto that Exhibits "A" to "P" both inclusive, as contained in the original bill of complaint herein as amended by defendant's original answer herein, shall constitute Exhibits "A" to "P" named in said amended bill of complaint, and shall be considered as Exhibits attached thereto as fully and effectually as if actually contained in and made a part of said amended bill of complaint.

Dated Honolulu, April 16, A. D. 1902.

KINNEY, BALLOU & McCLANAHAN,
Attorneys for Plaintiff.
LYLE A. DICKEY, *Attorney for Defendant.*

The foregoing stipulation is hereby allowed this 16th day of April A. D. 1902.

A. S. HUMPHREYS,
First Judge of the Circuit Court for the First Judicial Circuit, Territory of Hawaii.

Endorsed: Circuit Court 1st Circuit, Kapiolani Estate Ltd., vs. Mary H. Atcherley. Stipulation. Kinney Ballou & McClanahan, Att'ys for Plaintiff. Filed April 16, 1902. A. G. Kaulukou, Clerk.

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

KAPIOLANI ESTATE, LIMITED, Plaintiff,
vs.
MARY H. ATCHERLEY, Defendant.

Bill for Injunction, &c.

Amended Bill.

To the Honorable A. S. Humphreys, First Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, sitting in Chambers:

Your petitioner, the Kapiolani Estate, Limited, a corporation having its place of business in Honolulu, Island of Oahu, Territory of Hawaii, for an amended complaint herein, as per stipulation between the parties hereto, dated the — day of April A. D. 1902, on file in this case in court, represents and says:

1. That the defendant herein is a resident of Honolulu, Island of Oahu, Territory of Hawaii.

2. That on the 31st day of July A. D. 1901 said defendant herein filed an action of Ejectment against the plaintiff herein in the Circuit Court of the First Judicial Circuit to recover possession of a certain parcel of land situate on Queen Street, in Honolulu aforesaid, a copy of the declaration in ejectment in said action being hereto annexed and made a part hereof, the land covered by said declaration being land claimed by the plaintiff in fee simple,
6 and being also claimed in fee simple in said action of ejectment by defendant as aforesaid.

That said land is bounded and described as follows:

Apana 1, on Punchbowl street, commencing at the south corner of Queen and Punchbowl streets, and running S. 68 W. 7 chains 42 3/12 feet to the mauka side of the fish pond of H. Kalama, joining Punchbowl street; thence along the mauka edge of said pond S. 52 E. 4 chains 50 2/12 feet to the West corner of lot of Ke; thence N. 47 E. 2 chains 29 feet, N. 31 W. 23 9/12 feet, and N. 47¾ E. 4 chains 2 8/12 feet; all these lines join the house lot of Ke; thence 49¼ W. 39 7/12 feet to commencement, and containing an area of, to wit 2.32 acres.

3. That on or about the 29th day of December, A. D. 1856 one David Kalakaua under and through whom the plaintiff claims title to the land named in paragraph 2 of this bill, litigated his title to said land with the following parties, under whom the defendant claims title to said land, to-wit, Kinimaka, and Pai, his wife, and their children hereinafter named, said litigation taking place in

the Supreme Court of the then Hawaiian Islands, in equity; and, in this behalf and connection, and more particularly, the plaintiff alleges that, on the 29th day of December A. D. 1856, said David Kalakaua filed his petition in equity in the Supreme Court of the Hawaiian Islands against the said Kinimaka, claiming that the said Kinimaka held title to the land named in paragraph 2 of this bill in trust and as the guardian, of said Kalakaua, and not otherwise, and praying that said Kinimaka might be declared trustee of said land for said David Kalakaua, and that he might be decreed to convey the same in fee to the said David Kalakua in execution of the trust alleged and set up as aforesaid in said bill of complaint, which said bill of complaint, or petition, marked Exhibit A, is hereto attached and made part hereof.

7 4. That, upon this petition, a summons was thereafter duly issued and served, a copy of which summons, marked Exhibit "B" is hereto attached and made a part hereof.

5. Your petitioner is informed and believes, and upon such information and belief alleges that, thereafter, to-wit, on or about January 24th, 1857, after service of the aforesaid petition, and before filing an answer thereto, the said Kinimaka died.

6. Your petitioner is informed and believes, and upon such information and belief alleges, that the said Kinimaka, at the time of his decease, left him surviving a widow, Pai, and, as his devises, three children, to-wit, Kaniu Kinimaka (w), David Leleo Kinimaka, and Moses Kapaakea Kinimaka, to which said children the said Kinimaka devised all his real estate including the property in question. The will of said Kinimaka, together with all of the papers, exhibits and pleadings on file in the Supreme Court of the Hawaiian Islands in the Estate of said Kinimaka being made a part of this bill of complaint, plaintiff craving leave to refer thereto without incorporating said records more formally and fully in this complaint.

7. That the said David Kalakaua claimed that, under said will of said Kinimaka, his said children and widow then and there became trustees of the property which is the subject matter of this bill of complaint, for the benefit of said David Kalakaua, and in the same manner and under the same trusts as formally held by said Kinimaka.

8. That thereafter and on the 16th day of March 1857 said David Kalakaua filed a suggestion in the Supreme Court of the then Hawaiian Islands, in equity, to the effect that said Kinimaka had deceased before answering his original petition filed as aforesaid on the 29th day of December 1856; that the said Kini-

8 maka had left, surviving him, a widow, Pai, and three minor children, as heirs by the will of him, the said Kinimaka, and praying that the said widow and children be made parties to said original suit, and that a guardian ad litem be appointed for said children; a copy of which suggestion, marked Exhibit "C," is hereto annexed and *part* a part hereof.

9. That thereafter, to-wit, on March 8th, 1858, the said David Kalakaua filed a petition for the administration of the Estate of

one Kaniu, deceased, under whom said Kalakaua claimed said land, and for the appointment of an administrator, and for the appointment of a guardian ad litem for the three minor children of Kinimaka, deceased. A copy of said petition, marked Exhibit "D" is hereto annexed and made a part hereof.

10. That, upon reading and filing the said petition an order was made appointing George E. Beckwith administrator of the Estate of Kinimaka, deceased, guardian ad litem of the three minor children of the said Kinimaka. A copy of said order, marked Exhibit "E," is hereby annexed and made a part hereof.

11. That upon this petition, to-wit, the petition set forth in paragraphs 9 and 10 of this bill, a summons was duly issued, citing George E. Beckwith, administrator of the Estate of Kinimaka, deceased, and guardian ad litem of the minor children, and Pai, the widow of said Kinimaka; a copy of which summons, marked Exhibit "F," is hereto annexed and made a part hereof.

12. That upon this petition a hearing was afterwards had and evidence taken. A copy of the record of the proceedings and of the evidence taken thereat, marked Exhibit "G" is hereto annexed and made a part hereof.

13. That thereafter a decree was rendered in the said
9 cause by the Honorable G. M. Robertson, and duly filed, adjudging the said David Kalakaua to be the devisee of the said Kaniu, deceased and directing letters testamentary to be issued to him. A copy of said judgment and decree, marked Exhibit "H," is hereto annexed and made a part hereof.

14. That thereafter, to-wit, on May 3d, 1858, letters testamentary were duly issued to the said David Kalakaua, as administrator of the Estate of Kaniu, deceased; a copy of said letters testamentary, marked Exhibit "I" being hereto attached and made a part hereof.

15. That afterwards, to-wit, upon June 19th, 1858, the said David Kalakaua filed a further petition alleging substantially the same facts as in the petitions of December 29th, 1856, and of March 16, 1857, with the additional fact that one Richard Armstrong had been appointed guardian of the minor children, and praying that he, as such, might be ordered to convey the said lands now in question to the said petitioner, David Kalakaua. A copy of said petition, marked Exhibit "J," is hereto annexed and made a part hereof.

16. That upon this petition a summons was duly issued and served upon Richard Armstrong as guardian of the said minor children of Kinimaka, and Pai; a copy of which said summons, marked Exhibit "K," is hereto annexed and made a part hereof.

17. That thereafter the defendants duly filed an answer to said petition; a copy of which said answer, marked Exhibit "L," is hereto annexed and made a part hereof.

18. That thereafter, to-wit, upon August 18th, 1858, in chambers, before the Honorable E. H. Allen, Chief Justice of the Supreme Court of the Kingdom of Hawaii, evidence was taken and the cause was heard upon the merits. A copy of the records of the proceedings in said cause and the evidence taken therein, marked Exhibit "M," is hereto annexed and made a part hereof.

10 19. That thereafter, to-wit, upon November 2d, 1858, the Honorable E. H. Allen, Chief Justice, in Chambers, adjudged and decreed as follows—which decree was duly entered upon the records of said court: "David Kalakaua against Richard Armstrong, guardian of David Leleo, Kaniu, and Kinimaka, minor children of Kinimaka, deceased. The court did order, adjudge and decree in this matter that Mr. Armstrong, the guardian of David Leleo, Kaniu, and Kinimaka, minor children of Kinimaka, deceased, do convey to David Kalakaua, the plaintiff in this case, the land named Onoulimaloo, on the Island of Molokai, and the first Apana of land set forth in Royal Patent 1602 filed in this cause. John E. Barnard, Clerk of the Supreme Court." A copy of said decree, marked Exhibit "N," is hereto attached and made a part hereof.

20. That the said Richard Armstrong, was, in fact, at that time the duly appointed guardian of the said minor children, having been appointed thereto by the Honorable G. M. Robertson on May 5th, 1858, upon the petition of Pai, the widow of said Kinimaka and the mother of said minor children. A copy of said petition, marked Exhibit "O," and a copy of said appointment marked Exhibit "P," being hereto annexed and made parts hereof; and the entire record, including all of the papers and exhibits of said guardianship matter as now on file in the Supreme Court of the Hawaiian Islands, in equity, being made a part hereof, and complainant craving leave to refer to the same as if the same were more formally and fully incorporated in this bill of complaint.

21. That it does not appear from the records either of the court or in the Registry of deeds, in Honolulu, Hawaiian Islands, that the said decree of the Supreme court directed against Richard Armstrong as guardian of said minor children of Kinimaka, deceased, and ordering a conveyance of the property to said David
11 Kalakaua, was, in fact, obeyed by the said Richard Armstrong, but, after said decree was made, the said David Kalakaua ceased to be molested in any way by either the widow and heirs aforesaid of said Kinimaka, or by the said Armstrong in their behalf, and retained open, notorious, and undisputed possession, and dealt with the said land in all ways as his own, and continued to do so until he disposed of the said property.

And complainant hereby makes all papers, pleadings and exhibits of whatsoever kind in said equity proceedings a part of this bill of complaint, and makes profert thereof, and asks leave to refer to the same as fully and effectually as if actually incorporated in extentio in this bill of complaint.

And, in this connection, the complainant attaches hereto a copy of the original land commission award and royal patent, and copies of the original record of evidence given before the Land Commission in support of said land commission award and royal patent the same being referred to and made a part of the evidence in said equity proceedings instituted in the years 1856 and 1857 above referred to, which said copies are made a part of this bill of complaint, being marked respectively Exhibits "Q," "R" and "S."

22. That the successors in title of the said David Kalakaua have at all times retained and been in open, notorious and, until on or

about January first, 1900, undisputed possession of the said property, and have in all ways, dealt with it as their own; that the petitioner herein is a bona fides purchaser for a valuable consideration, and without notice of the aforesaid property, and that it claims title thereto from the said David Kalakaua as follows, to-wit: by a deed from David Kalakaua to Luakini and wife, dated March 9th, 1868, and recorded in Oahu Registry of Deeds, book 25, page 332; by a deed from Luakini and wife to Kapiolani dated April 1st,
12 1868, and recorded in Oahu Registry of Deeds, book 25, page 336; by a deed from Kapiolani to David Kawananakoa and J nah Kalanianaloe, dated February 10th 1898, and recorded in Oahu Registry of deeds, book 176, page 232; by a deed from David Kawananakoa and Jonah Kalanianaole to E. H. Wodehouse, dated July 12th 1898, and recorded in Oahu Registry of deeds, book 181, page 294; by a deed from E. H. Wodehouse to David Kawananakoa and Jonah Kalanianaole, dated June 25th, 1899, and recorded in Oahu Registry of deeds, book 195, page 233; by a deed of David Kawananakoa and Jonah Kalanianaole to Kapiolani Estate, Limited, dated August 7th, 1899, and recorded in Oahu Registry of deeds, book 194, page 427.

23. Your petitioner is informed and believes, and upon such information and belief alleges, that the said children of the said Kinimaka, to-wit, Kaniu, David Leleo, and Moses Kapaakea, to whom the said Kinimaka devised his interest in the said property in question, to-wit, his bare legal title therein, which the said children received and held in trust for the said David Kalakaua and his successors in title, were at all times well aware that the said David Kalakaua and his successors were in the said open, notorious and undisputed possession of said property, and dealing with it as their own.

24. That the said Kaniu Kinimaka attained the age of majority about the year 1867; that the said David Leleo Kinimaka attained the age of majority about the year 1871; that the said Moses Kapaakea Kinimaka attained the age of majority about the year 1877; that, at no time did they or any of them assert any claim in, or to any of the said lands, or in any way deny the rights of the said David Kalakaua and his successors in title thereto, but, they at all times acquiesced in the open, notorious and undisputed possession and claim of the said David Kalakaua, and his successors in title in and to all of the aforesaid property.

13 25. That by the will of the said Kinimaka aforesaid all of his property was devised to his said daughter, Kaniu, for her lifetime, and then to his son, David Leleo Kinimaka, for his lifetime, and the remainder to his son, Moses Kapaakea Kinimaka; that the said Moses Kapaakea Kinimaka, claiming to own the land in question, sold his alleged estate in remainder to defendant May 18th, 1897, by deed recorded in the office of the Registrar of Conveyances in Honolulu, book 167, page 368; that the said David Leleo Kinimaka died before Kaniu Kinimaka; that on January 4th, 1901, said Kaniu Kinimaka died, and the defendant herein claims that, by reason of her death, a fee simple estate is vested in

her, the defendant, with the right of immediate possession under and by virtue of said deed to her, said defendant, from said Moses Kapaakea Kinimaka.

26. That the said plaintiff in the present cause has a clear and unbroken chain of title to the said lands by mesne conveyances from Kalakaua, Luakini and wife, Kapiolani, David Kawananakoa and Jonah Kalanianole, and E. H. Wodehouse; all of which deeds are duly recorded in the office of the registry of deeds, and that said plaintiff has, today, all the right, title and interest formerly held by the said David Kalakaua in and to the said lands.

27. That owing to the failure on the part of the said Richard Armstrong as guardian of the children, David Leleo, Kaniu, and Moses Kapaakea Kinimaka, of Kinimaka deceased, and his devisees of the land in question, to convey of record their interest as ordered by the court, plaintiff's record of chain of title from the deceased to him, by virtue of the above mentioned decree, through which plaintiff claimed, is incomplete.

28. That by the said actions in ejectment the defendant seeks to take unconscionable advantage of the above mentioned technical error in the chain of title of your petitioner. That said
14 claims constitute a cloud upon the title of petitioner in and to the land aforesaid, and that defendant is using the fact that the legal title to said land is in her as aforesaid to harass plaintiff with litigation, and to cloud its title and to shut plaintiff out of the due and full enjoyment of the same.

29. That it would be inequitable to allow the present defendant to prosecute her action of ejectment until the bare legal title to the property in question which she is holding wrongfully, and against the right of the petitioner, and as naked trustee thereof, should by her be conveyed to said petitioner.

30. That owing to the above recited facts, and to the fact that the present defendant is a married woman, your petitioner herein has no plain, complete and adequate remedy at law.

31. That for this court to issue its restraining order as herein prayed for would avoid a multiplicity of suits in the premises, and work no inequity to the defendant.

Wherefore, and inasmuch as your petitioner is remediless by the strict rules of the common law, and can have relief only in such court of equity, where such matters are properly cognizable, your petitioner prays that the process of this Honorable court may issue against said defendant, summoning her to appear and answer this complaint, and be bound by the proceedings thereunder, and to abide by all further orders and decrees of this Honorable court.

(*b*) That a temporary injunction may issue out of this Honorable court, restraining the defendant herein, her counsellors, solicitors, attorneys and agents, from the further prosecution of her action in ejectment until the further order of this court.

(*c*) That a permanent injunction may issue out of this Honorable court restraining the defendant herein from proceeding with any further action at law under any claim of title to the
15 aforesaid lands derived either directly or indirectly through Kinimaka, deceased.

(*d*) That the defendant herein may be declared to be the trustee of all the right, title and interest of the said Kaniu Kinimaka, David Leleo Kinimaka and Moses Kapaakea Kinamaka, in and to the lands in question, for the benefit of the petitioner, as a cestui que trust, and that as such trustee she may be ordered to convey all such interests to the said petitioner.

(*e*) That this Honorable court may order and decree to the petitioner any such further and other relief as to this court may seem proper in the premises, together with the costs incurred in this suit.

KAPIOLANI ESTATE, L'T'D.

(Signed) By its Treasurer, JOHN F. COLBURN.

(Signed) KINNEY, BALLOU & McCLANAHAN,
Att'ys for Pl'ff.

ISLAND OF OAHU,
Territory of Hawaii, ss:

John F. Colburn, being first duly sworn, on oath deposes and says:

That he is the Treasurer of the Kapiolani Estate, Limited; that he has read the foregoing bill of complaint, and knows the contents thereof, and that all the matters and things therein alleged are true, except as to those matters and things alleged on information and belief, and, as to those matters, he believes them to be true.

(Signed) JOHN F. COLBURN.

Subscribed and sworn to before me this 16 day of April A. D. 1902.

[SEAL.] (Signed) CARLOS A. LONG,
Notary Public, First Judicial Circuit.

16 **Ex. A.**

DAVID KALAKAUA
vs.
KINIMAKA.

To the Honorable the Chief Justice of the Hawaiian Islands, Sitting as a Court of Chancery:

Humbly complaining showeth unto Your Honor, Your Orator, David Kalakaua of Honolulu, Oahu, Hawaiian Islands, as follows:

That he Your Orator, born on or about the — day of November A. D. 1836 in his early years and prior to the year 1844 lived with one Kaniu, otherwise called Haaheo, a female chief of this Kingdom, as her adopted child, according to the then custom of the country—being related to the said Kaniu as follows, viz—as the son of Kapaakea and Keohokalole the great grandson and great granddaughter of Kamakaeheikuli, of which Kamakaeheikuli the said Kaniu was grand-daughter. That, as Your Orator is informed and believes and therefore avers, the said Kaniu was seized of certain

rights hereditary and other, in sundry lands situate within this Kingdom,—to wit, in the lands of

Kukuluwaluhia,	Kohala,	Hawaii
Peahi-	Hamakualoa,	Maui
Aleamai	Hilo	Hawaii
Ulaimuku	Kau	"
Kahilipali	"	"
Ponahawaii	Hilo	"
Kalaoa	Kona	"
½ Keaua	Koolauloa-	Oahu
Maihi-	Kona	Hawaii
Kalahiki	"	"
Onoulimaloo		Molokai
½ Keaua	Koolauloa	Oahu

17 and also certain houselots and small divisions of land in and near Honolulu, Oahu—viz.—those described in the Award of the Board of Land Commissioners No. 129 [confirmed by Royal Patent No. 160]* which rights as Your Orator is advised by Counsel and believes, by the law of the land and the custom of the country, descended to her heirs:— And Your Orator further showeth that the said Kaniu deceased during or about the year 1844, leaving no issue but a surviving husband Kinimaka by name,—and although owing to his tender years at that time your Orator cannot of his own knowledge allege—Yet he is informed and believes and therefore avers—that at all times while in health and prior to her said decease Kaniu did declare her intention to make Your Orator her heir, and that on the day of her decease and in immediate expectation thereof, and in the presence of several high chiefs of this kingdom, to wit,—of M. Kekuanaoa and others, competent witnesses thereto, she did solemnly nominate and appoint Your Orator, being then an infant as aforesaid to be her heir,—and that then and thereafter, Your Orator, was by the then King, Kauikeaouli, Kamehameha, III, and by the high chiefs of the Kingdom, regarded as the lawful heir to the property of Kaniu aforesaid.—And Your Orator further showeth unto — Honor, that on the said decease of Kaniu, Your Orator being an infant as aforesaid, the said Kinimaka, assumed the guardianship of the said property, and continued to exercise the powers of a guardian therein until the time of the division of lands in the Year 1848—when he surrendered the first eight lands above-named to His Majesty Kamehameha III retaining the remaining four—which four he did or should have received in trust for Your Orator:—And furthermore during the Session of the Board of Land Commissioners to quiet Land Titles, the said Kinimaka did enter before the said Board the claims to the houselots and small divisions of land aforesaid belonging to the Estate of Kaniu, and procure the same to be awarded to himself, which lots and
18 divisions as shown by the testimony taken before the said Board, could only be held by the said Kinimaka, in trust for

[* Words and figures enclosed in brackets erased in copy.]

the heir of Kaniu, which heir Your Orator claims to be as hereinbefore shown:—And Your Orator further showeth to Your Honor, that prior to the decease of Kamehameha III and Abner Paki a high Chief and during the minority of Your Orator, the said Kinimaka never disputed or denied the rights of Your Orator in the premises, but on the contrary frequently to Your Orator, and as Your Orator is informed, to others, did expressly declare, treat and speak of Your Orator as the adopted child of Kaniu, and the heir to the property aforesaid—Wherefore Your Orator did not then become aware of any intention on the part of the said Kinimaka to defraud or injure Your Orator in the premises:—But subsequent to the death of Kamehameha III—and of the A. Paki aforesaid, and since Your Orator arrived at legal age the said Kinimaka has pretended that he himself is the heir of Kaniu and sole owner of the said property, has refused to convey the same to Your Orator, and has denied and does still deny Your Orator's rights therein and thereto:—Therefore Your Orator charges, that the said Kinimaka, well knowing the premises, to wit, that Your Orator is heir of Kaniu and of right entitled to the possession and enjoyment of the said property and that he has held the same only in trust for Your Orator—has withheld and doed withhold the same collusively, fraudulently and with intent to deprive Your Orator of his just rights therein:—

Wherefore Your Orator prays the aid of Your Honorable Court that a day and hour may be appointed for the hearing of this his complaint and of the proofs of the matters herein set forth, and that the said Kinimaka may be cited then and there to appear before Your Honorable Court to answer to the matters and things herein contained as fully as if as to each and to all of them particularly interrogated and to show cause, if any there be, why the prayer of Your Orator should not be granted:—And that Your Honorable Court will grant such other and further relief in the premises
19 as Your Honorable court may be competent to give and as Justice may demand.

And Your Orator will Ever Pray &c.

(Sig.) DAVID KALAKAUA.

Subscribed and sworn to before me this 29th day of December 1856.

(Sig.) G. M. ROBERTSON,
Acting Chief Justice of the Supreme Court.

Let process issue as prayed for, returnable before the Chief Justice at Chambers, on the 14th day of January 1857.

(Sig.) G. M. ROBERTSON,
Acting Chief Justice.

20 **Ex. B.**

To William C. Parke, Marshall of the Hawaiian Islands, Greeting:

You are commanded by order of the Honorable William L. Lee, Chief Justice of the Supreme Court, to summon Kinimaka of —,

Defendant, to be and appear before the Honorable William L. Lee aforesaid, at his Chambers in the Court House in the city of Honolulu, Island of Oahu, on Wednesday the fourteenth day of January next, at ten o'clock A. M. to show cause why the prayer of David Kalakaua, Complainant, should not be granted, pursuant to the tenor of his bill of complaint hereto annexed.

And have you then there this writ, with full return of your proceedings thereon.

Witness, the Honorable William L. Lee, Chief Justice of the Supreme Court, at Honolulu, this 30 day of December A. D. 1856.

(Sig.) JNO. E. BARNARD,
Clerk Supreme Court.

21 **Ex. C.**

To the Honorable G. M. Robertson, Acting Chief Justice and Chancellor of the Hawaiian Islands:

In re DAVID KALAKAUA
vs.
KINIMAKA.

The Orator in the above entitled cause, by The Undersigned His Attorney, respectfully suggests to Your Honor, that on or about the 24th day of January last, the above named Respondent deceased, after service of Your Orator's Petition and before answer filed—leaving as heirs by will his three minor children Kaniu, D. Leleo & Moses Kapaakea—which said will has been duly admitted to Probate:—and Your Orator further suggests that the said heirs are the legal representatives and successors of the Respondent, aforesaid, in the Trust in certain Real Estate charged in the Bill filed in this cause to exist in favor of Your Orator.

Wherefore the said Orator prays that the said heirs may be made parties to the said Bill, and that a Guardian ad litem may be appointed for them by Your Honorable Court. And that Your Honor will be pleased to appoint a day and hour for the further hearing of this Cause.

And Your Orator will ever pray &c.

Honolulu, March 16th 1857.

(Sig.) JAS. W. MARSH,
Att'y for Kalakaua, Orator.

22 **Ex. D.**

To the Honbl. G. M. Robertson, Associate Justice of the Supreme Court:

OAHU, *ss:*

In Probate.

The undersigned David Kalakaua respectfully makes known unto your Honor, that one Kaniu a native Chief-ess of this country de-

ceased about the year 1843 at Honolulu—and in accordance with the then usage of this country—verbally bequeathed all her property to your petitioner who was her adopted son, and grandson to the brother of the deceased—directing her husband one Kinimaka to take care of her said property for the benefit of the petitioner. And your petitioner further represents that, at the time of the decease of the said Kaniu she was possessed of and entitled to a large amount of real property in this Kingdom—Wherefore your petitioner prays that he may be permitted to prove the will and testament of the deceased as aforesaid and his relationship to the deceased—And that letters of administration upon the Estate of the said Kaniu may be granted to him the undersigned—And your petitioner further prays that George E. Beckwith Esq. Administrator of the Estate of Kinimaka which Kinimaka was the husband of Kaniu and is now deceased—and Pae—widow of the said Kinimaka, may be cited to show cause, if any they have, why letters of administration may not issue to the undersigned as prayed—And your petitioner further prays that a guardian ad litem may be appointed for the minor of the children of the said Kinimaka and that the said children may be cited by their said guardian—to show cause why Letters should not issue as aforesaid.

Your petitioner is advised and believes that the said minor children are three in number—Kaniu—D. Leleo & Moses Kapaakea.

23 And your petitioner as in duty bound will ever pray etc.

(Signed) CHAS. C. HARRIS,
Attorney for David Kapaakea Kalakaua.

Honolulu, Oahu, March 6th, 1858.

Subscribed and sworn to before me this 8th day of March 1858.

(Signed) WILLIAM HUMPHREYS,
Clerk Supreme Court Pro Tem.

24 **Ex. E.**

Supreme Court, at Chambers.

March 9, 1858.

Before the Hon. G. M. Robertson, Associate Justice.

In the Matter of the Estate of L. H. KANIU, Deceased, and the Appointment of a Guardian for the Minor Children of Kinimaka.

Upon reading and filing the Petition of David Kalakaua for Letters of Administration upon the Estate of Kaniu, deceased, and the appointment of a Guardian ad litem for the minor children of Kinimaka.

The Court did order that George E. Beckwith, the Administrator upon the Estate of Kinimaka, deceased be appointed Guardian ad

litem of the three minor children of Kinimaka, Kaniu, D. Leleo and Moses Kapaakea.

(Signed) WILLIAM HUMPHREYS,
Clerk Sup. Court Pro Tem.

25 **Ex. F.**

To W. C. Parke, Marshal of the Hawaiian Islands, Greeting:

You are hereby commanded to cite George E. Beckwith Esqr. administrator upon the Estate of Kinimaka and Guardian ad litem of the minor children of the said Kinimaka, and Pae his widow to be and appear at the Court house in the Town of Honolulu, to show cause if any they have, why Letters of Administration may not issue to David Kalakaua upon the Estate of Kaniu deceased, in accordance with the prayer of his petition to that effect, on the 17th day of March inst. at nine o'clock A. M. which suit is then and there to be tried: Hereof fail not at your peril, and make due return of your process, with your proceedings thereon.

Witness, the Honorable Elisha H. Allen, Chief Justice of the Supreme Court, at Honolulu, this 9 day of March A. D. 1858.

[SEAL.] (Signed) WILLIAM HUMPHREYS,
Clerk Sup. Court Pro Tem.

26 **Ex. G.**

Supreme Court, at Chambers.

17 March, 1858.

Before the Hon. G. M. Robertson, Associate Justice.

In the Matter of the Estate of L. A. KANIU, Deceased.

Petition of D. Kalakaua for Letters of Administration & Appointment of Guardian ad Litem to Minor Children.

Mr. Harris appeared for D. Kalakaua.

Mr. Bates appeared for the Guardian appointed by the Court on the 9th of March.

Mr. Bates admitted that Kalakaua was not 20 years of age when he commenced these proceedings, had no objection to their taking out Letters of Admn.

Mr. Harris moved the evidence of the 26 Feb'y on appl'n made by Kalakaua to Judge Andrews on this same issue may be read and received on the present hearing.

Motion granted.

Mr. Harris moved that, verbal wills being admitted under the old custom this should be read. It was admitted that up to the year 1844 the Chiefs by the Custom of the country were in the habit of passing their estates by verbal wills with the knowledge & consent of the King, and that such wills were recognized by the

authorities binding & operating and that coverture did not affect the right to make a will.

NAUHELE, sworn, says:

I was acquainted with Kaniu when she was alive—I was present when she died—I heard her make a declaration regarding her property—after the death of Kaniu I continued to live with
27 Kinimaka, the husband of Kaniu—In 1848 at the time of the great division of land Kinimaka went before the King & claimed the land of Kaniu for himself because the words of the deceased had been left without being fulfilled and in a state of uncertainty on account of the youth of David—I went with Kinimaka myself the King said part of the land should be set apart for the Government and part for Kinimaka—that was in accordance with Kinimaka request. When Gov. Kekuanaoa arrived at the house Kaniu said to him in presence of her husband I have sent for you and now declare to you who is to be my heir, our grand child to be heir of all my property from Hawaii to Kauai and every thing that belong to me—the Gov'r said to her that David was very young and unable to take care of the property thereof you had better let Kinimaka have the property till David grows up—Kaniu declined this proposition to consider the property any one's but David's but wished it to be his at once—and requested the Governor to take care of it but he said Kinimaka should take care of it till he died—I don't know if the King knew anything about the will at that time, he might have known of it afterwards.

KAHINA, sworn, says:

I lived with Kinimaka—from the time I was a small boy—I have heard Kinimaka speak of it but was never present at any conversation between the King & Kinimaka with regard to it.

The Court adjourned this case until Wednesday the 24th instant for the production of further evidence.

(Signed) WILLIAM HUMPHREYS,
Clerk Supreme Court Pro Tem.

28 Supreme Court, at Chambers.

24 March, 1858.

Before the Honorable Elisha H. Allen, Chief Justice.

In the Matter of the Estate of L. H. KANIU, Deceased.

Parties appeared pursuant to adjournment from the 17th current. As Justice Robertson was out of town he having heard the former evidence in this case; the Court adjourned the further hearing until the 31st inst.

(Signed) WILLIAM HUMPHREYS,
Clerk Sup. Court Pro Tem.

29 Supreme Court.

April 1, 1858.

Before the Hon. G. M. Robertson, Associate Justice.

In the Matter of the Estate of L. H. KANIU, Deceased.

Parties appear*ance* pursuant to adjournment.

M. KEKUANAOA, sworn, says:

I knew Kaniu—I was present at the time she died—previous to her death she sent for me to come and see her—I asked what she wished, she replied that she thought she was dying, and wished the Governor to hear what she had to say—I was at that time Judge of the court at Oahu and also Governor of the Island—I asked her "who do you wish to be your heir?" she replied "that David Kalakaua was to be her heir to all her property, she had taken David Kalakaua who was then an infant and adopted him according to the custom at that time"—Kaniu was of higher rank than her husband who was a petty chief—Kinimaka was present at that time—I said to her that she had better leave the property in the hands of Kinimaka until David became of age—she assented to that—I understood Kinimaka to agree to the proposal at the time—it was usual for parties who were dying to send for me in those times that I might hear what they had to say relating to their property as agent for the King. Kaniu did not notify me that she had adopted David Kalakaua, she had stated so to me before that time—I think the law relating to the adoption of children had not been enacted at the time she informed me of having adopted David—I remember that Kinimaka went to Lahaina to inform the premier and I at the same time wrote to the premier informing her that Kaniu was dead and that she had willed her property to David Kalakaua, Kinimaka to take charge of it till David came of age—I received a letter from the Premier afterwards informing me that the King had given all the property to Kinimaka himself—When I met the Premier I told her that it was in accordance with the will
30 of Kaniu and she replied "well the King has done it"—Kaniu stated that the paper which I saw expressed her will in the same way that she had expressed it verbally—I did not see her sign the paper but she told me that she signed it—she may have lived a week after this—I did not visit her house again between the time of this conversation and her death.

KANAINA, sworn, says:

I knew Maniu and her husband Kinimaka—I was at Lahaina when Kaniu died—Kekauluohi the late Premier was my wife—I remember that Kinimaka came up to Lahaina to inform the Premier of the death of Kaniu—Kinimaka informed the Premier in my presence and in the presence of several other chiefs that Kaniu had

left her property to David Kalakaua—Kekauluohi said "that is good if you and your wife agreed to do so it is right the property should go to the moopuna"—I never heard any conversation between Kinimaka and the King respecting this subject, but suppose the King heard of it—I never heard whether the King approved of it or not—the Premier received a letter from the Governor of Oahu informing her of Kaniu's death and that she had left her property to David Kalakaua—Kinimaka told me that Kaniu said the property was to be in his charge for his lifetime and afterwards to go to David Kalakaua—this conversation took place shortly after Kaniu's death—I cannot state what year Kaniu died.

The Court postponed the further hearing of this case until 24th inst.

(Signed) WILLIAM HUMPHREYS,
Assist. Clerk.

31 Supreme Court, at Chambers.

24th April, 1858.

Before Geo. M. Robertson, Associate Justice.

In the Matter of the Estate of L. H. KANIU, Deceased.

Mr. Harris for the applicant made his argument to the Court.
Mr. Davis, for the widow and heir of Kinimaka.
The Court took time to consider of the case.

32 Ex. H.

Supreme Court.

In the Matter of the Estate of L. H. KANIU, Deceased.

Judgment.

My judgment is that the verbal will of L. H. Kaniu, made in the year 1843, by which she bequeathed all her property to David Kalakaua, is duly proven, and that letters testamentary thereon, with copy of this judgment annexed, be issued to him, the said David Kalakaua.

(Signed) G. M. ROBERTSON,
Associate Justice of the Supreme Court.

Honolulu, 3rd May 1858.

HONOLULU, *Oahu:*

I hereby certify that the foregoing are true and faithful copies of the Original documents now on file in the office of the Supreme Court.

3—174

As witness my hand and the Seal of the Supreme Court at Honolulu, Oahu this 20th day of July A. D. 1858.

(Sig.) JNO. E. BARNARD,
Clerk Supreme Court.

33 **Ex. I.**

Letters Testamentary.

To all persons to whom these Presents shall come.

Be it known that I, G. M. Robertson, Associate Justice of the Supreme Court of Law and Equity for the Hawaiian Islands, by virtue of the powers vested in me, do hereby grant these letters testamentary, with copy of Judgment annexed, to David Kalakaua, upon the will of L. H. Kaniu, late of Honolulu, in the Island of Oahu, deceased. And I do hereby give him the aforesaid David Kalakaua, all the necessary powers of administering upon all the rights, credits and effects, real and personal of the said L. H. Kaniu, of Honolulu, Oahu, deceased, and of collecting and settling all debts due to, or owing by said Estate, and all persons are hereby commanded to respect this his authority.

Given under my hand and the seal of this Court, at Honolulu, this 3rd day of May, A. D. 1858.

(Signed) G. M. ROBERTSON,
[L. S.] *Associate Justice of the Supreme Court.*

34 **Ex. J.**

To the Honbl. E. H. Allen, Chief Justice of the Supreme Court of Law & Equity of the Hawaiian Islands:

In Equity.

The undersigned your Orator, respectfully represents and gives this Honbl. Court to understand that One Kaniu, a native Chiefess of this Country, deceased at Honolulu, Island of Oahu during or about the year 1843, having declared by her last will and testament your Orator, to be her heir, and directed that her property should become the property of the Orator, that your Orator was at that time to wit at the time of the decease of the said Kaniu, an infant your Orator having been born, as he is informed and believes, on the 16th day of November A. D. 1836. That the aforesaid Kaniu, at the time of her said decease, directed her Husband, one Kinimaka to manage the property thus bequeathed, to your Orator, for his, your Orator's benefit, during your Orator's infancy—That however—Your Orator on coming of age—discovered that the said Kinimaka, whilst acting as guardian, as aforesaid, had procured the awards of the lands belonging to the said Kaniu, during her lifetime to be wrongfully and fraudulently issued, in his own the said Kinimaka's name; that the said Kinimaka deceased in the month

of January 1857, without having conveyed the titles of the property to your Orator—And your Orator further makes known to your Honbl. Court, that on the 3d day of May, this present year your Orator duly proved the will of the said Kaniu, at a Court of Probate duly held, on the said day before the Honbl. Associate Justice G. M. Robertson; the certificate of which said probate, is hereto annexed—And your Orator further makes known to Your Honbl. Court, that the lands bequeathed to him, by the said Kaniu are two House-Lots in the City of Honolulu—awarded by Land-Commission Award No. 129—confirmed by Royal Patent 1602—in the Island of Molokai, called Onoulimaloo and awarded by Land Com-
35 mission Award No. 7130, with a kalo patch at Kaaleo—Island of Oahu—as per Award No. 7130. And Your Orator further makes known to Your Honorable Court that the title of the said lands was at the time of the decease of the said Kinimaka in the said Kinimaka, in trust for, and for the use and benefit of Your Orator—That Your Orator is the grand nephew of the deceased Kaniu, and was her adopted child—as your Orator is informed and believes, and therefore swears—Your Orator is advised by counsel that at the time of the decease of the said Kaniu, his said ancestress, she was competent, by the Law and Custom of this Kingdom, to make a will and that her said will would, pass the said property to, and vest the same, in your Orator—or in the aforesaid Kinimaka, for his your Orator's use & benefit—And Your Orator would farther represent that the procuring of the said Award to be made in his own name, by the said Kinimaka was contrary to equity and good conscience—And Your Orator woul*f* farther represent, that the said Kinimaka, at the time of his decease, left a widow, by name—Pai—and minor children by name Kaniu—David Leleo & Kinimaka, who by law succe*de* to the rights of the said Kinimaka, for which said children—R. B. Armstrong D. D., has been appointed Guardian—And Your Orator, respectfully representing that he can have no remedy in the premes*es*, except in a Court of Equity, humbly prays that the said Pai and the Guardian of the said children, may be summoned to show cause, at such time and place as may be most convenient for your Honbl. Court why it should not be decreed that the lands, herein before mentioned, of right belong to Your Orator—And Your Orator further prays that it may be decreed, that the said Kinimaka did, during his life time, procure the Awards—and held possession of the before mentioned lands, for the use and benefit of Your Orator—And further that the said R. B. Armstrong Guardian, of the said minor Children of the said Kinimaka—may be ordered to Convey to your Orator all the right title and interest of the said Children in the aforesaid lands; and further that
36 the aforesaid Pai—widow, as aforesaid of the said Kinimaka, deceased, may be ordered to convey to your Orator, all her right title and interest in and to the above enumerated lands—And that all such other orders and decrees may be made and passed in the premises, as may pertain to Equity and good conscience, and may give relief to Your Orator in the premises.

And Your Orator as in duty bound, will ever pray etc.
Honolulu, Oahu, July 19th A. D. 1858.

(Signed) DAVID KALAKAUA,
" CHARLES C. HARRIS,
For and in Behalf of David Kalakaua, to Me Well Known, Being Duly Sworn, Deposeth & Saith that the Facts Hereinabove Set Forth Are True.
" CHAS. C. HARRIS.

Subscribed and sworn to before me this 19th day of July A. D. 1858.

(Signed) JNO. E. BARNARD,
Clerk Supreme Court.

Let process issue as prayed for returnable before me at my Chambers on the 23rd day of July, 1858.

(Signed) ELISHA H. ALLEN,
Chief Justice of the Supreme Court.

37 **Ex. K.**

To W. C. Parke, Esq're, Marshal of the Hawaiian Islands, Greeting:

You are commanded by order of the Honorable Elisha H. Allen, Chief Justice of the Supreme Court, to summon Pai (w) and Richard Armstrong (Guardian of Kaniu, David Leleo and Kinimaka minors) Defendants, to be and appear before the Honorable Elisha H. Allen aforesaid at his Chambers in the Court House in the city of Honolulu, Island of Oahu, on Friday the Twenty third day of July instant, at ten o'clock A. M., to show cause why the prayer of David Kalakaua of Honolulu, complainant,—should not be granted, pursuant to the tenor of his bill of complaint hereto annexed.

And have you then there this Writ, with full return of your proceedings thereon.

Witness, the Honorable Elisha H. Allen, Chief Justice of the Supreme Court, at Honolulu, this 20th day of July, A. D. 1858.

[SEAL.] (Signed) JNO. E. BARNARD,
Clerk Supreme Court.

38 **Ex. L.**

Before the Chief Justice of the Supreme Court, in Equity.

PAI & RICHARD ARMSTRONG, Guardians of Kaniu, David Leleo & Kinimaka, Minors,
vs.
DAVID KALAKAUA.

The Joint & Several Answers of Pai & Richard Armstrong, Guardian of Kaniu, David Leleo & Kinimaka, Minors, Defendants to the Bill of Complaint of David Kalakaua.

These defendants now & at all times hereafter saving & reserving unto themselves all benefit & advantage of exception to the said Bill of complaint for answer thereto saith they know not & have not been informed except by the complainants' Bill & can not admit or deny but that Kaniu, a native Chiefess did decease in or about the year 1843 having declared by her last will & Testament that the complain-t was to be her heir & that her property was to become his property, nor that the said complainant was a minor, nor that the said Kaniu at the time of her decease directed her husband to manage the property that had belonged to her as the property of the complainant during his infancy & leave the complainant to make proof thereof.

These defendants further answering say they are ignorant & can not state whether Kinimaka wrongfully & fraudulently procured awards to be issued in his own name of the land formerly belonging to Kaniu, but they state it as their belief, that if the awards have wrongfully been issued to the said Kinimaka, the same were issued upon testimony produced to the Board of Commissioners to quiet land titles, which satisfied that Board that the said Kinimaka
39 was entitled to such award.

These Defendants admit Kinimaka deceased in the month of January 1857 without having conveyed the title of the property to the Complainant and aver that he was never requested so to do during his life time as they verily believe.

These Defendants further admit that on the 3rd day of May in the year the Complainant did prove the Will of Kaniu as alleged in Complainant's Bill of Complaint, but they aver they have no knowledge & can neither admit or deny that this property bequeathed to the Complainant by Kaniu by said Will are the Lots or premises awarded by the said Board of Commissioners to quiet land titles to Kinimaka in Award, numbered 1602 7130 but leave the Complainant to prove his allegations in relation thereto.

And these Defendants further answering say they are ignorant & cannot admit or deny the allegations of the Complainant that the title vested in the said Kinimaka by aforesaid Awards were in trust for the use and benefit of the Complainant but leave the Complainant to make proof of the allegations in that behalf.

And these Defendants further answering say that they are not skilled in the Law and have no opinion in relation to the pretended will of Kaniu & leave it for the Court to adjudge upon the facts that may come to its knowledge whether by the said Will the said property hereinbefore set forth was vested in the Complainant or the aforesaid Kinimaka for his use & benefit, but they aver as far as they have any knowledge that the statement that the said Kinimaka procured an Award to be made in his name contrary to equity & good conscience.

And these Defendants further admit that at the time of Kinimaka decease he left a widow by the name of Pai & Minor children by the names of Kaniu, David Leleo & Kinimaka who claim that they are the lawful heirs of the said Kinimaka & that all of his estate is vested in them & they further admit Richard Armstrong has been duly appointed Guardian of the said Minor heirs—

40 And these Defendants Humbly submits & insists that the prayer of the Complainant's Bill of Complaints upon the facts as they now appear before the Court should not be granted & that unless the allegations are established by proofs, they should be hence dismissed with costs, most wrongfully sustained.

(Sig.) PAI,
RICHARD ARMSTRONG,
Guardian of Kaniu, David Leleo, Kinimaka, Minors,
(Sig.) By ASHER B. BATES,
Their Solicitor.

41 **Ex. M.**

Supreme Court, at Chambers.

Before Hon. E. H. Allen, Chief Justice.

18 August, 1858.

DAVID KALAKAUA
vs.
PAI, RICHARD ARMSTRONG, Guardian of Kanui, David Leleo, and Kinimaka.

Mr. Bates filed his answer by which he raised the question, admitting that Kaniu made a will leaving her property to David that the property in controversy was justly awarded to Kinimaka in his own right, & denied that it was in trust for David.

Mr. Harris said that Kaniu married Kinimaka, & that before her death she made a verbal will leaving her property to David & it had been decided by Justice Robertson that the verbal will was good. That Kinimaka died in 1843. That at the division of the lands the Ili Onouli maloo did actually belong to Kaniu and that he (Kaniu had no right except thro' Kaniu. The two house lots in Honolulu & one Kalo patch at Kaleo—which he claimed was awarded to Kinimaka by the Land Commission Award 129 and 240.

upon proof that they did belong to Kaniu. That if they belonged to Kaniu Kinimaka had no right to them, that he was not entitled to an award in his own right, but as the Guardian of—David Kalakaua under the will of Kaniu he was entitled to an award.

Mr. Bates admitted that at the time of making the will the whole property was given to David.—that at the time of her death she said to her husband, standing by at the time, that she wished him to take charge of all her property which she had willed to David:

R. G. Davis sworn as Interpreter.

C. KANAINA, sworn, says:

I knew Kaniu—I knew Kinimaka.—I am the husband
42 of Kekauluohi one of the late Premiers.—I was present at the great *great* division of the lands by the Chiefs. I am acquainted with the land called "Onoulu maloo" on Molokai. That land was Kaniu's at the time of her death. Kinimaka was not entitled to sit in the Council with the King. Kaniu was not one of the King's Chiefs in Council—Kaniu was a high Chiefess & related to Kahaumanu, but that she was not one of the King's high Councellor Chiefs.—This land originally belonged to Kaniu but when the King wished to divide the lands he wished all people who had received lands to come in and get them regranted. That in 1848 when they came in to get them divided & to get their grants Kaniu was dead & the reason Kinimaka got the land was because he appeared for her and her heirs. It was I understood the land then to belong to David. I knew Kinimaka almost up to the time of his death. Kinimaka never told me that land belonged to him.—Kinimaka spoke to me as if the land was David's as the mother had ordered it to be. Kinimaka acted as a sort of Steward, to David to look out for his property. The King knew about this Kauoha & the Queen & the men all about.—I was sitting with the Premier at Lahaina when Kinimaka came to tell her the news about his wife's death, & he told her about Kaniu's will. Kinimaka told the Premier at that time that David was to be her heir. Plenty people were sitting by at the time.

By Mr. BATES:

When Kinimaka came to the King & Chiefs he gave in an account of his own private lands & at the same time he gave an acc't of this land. It was decided that David should be the Konohiki under the King.—I always supposed that David was entitled to the land & this is a new thing Kinimaka claiming the land. Kinimaka was a favorite of the King.

(Mr. Bates admitted that David commenced an action as soon as he was of age against Kinimaka before he deceased.)

43 Kinimaka & Kaniu had no children he afterwards married Pae. Kaniu had a daughter by Gov. Adams but she is now dead. Kaniu was considerably older than Kinimaka. She was not very old but she had no children.

Old Blue Law—pp. 47, 48, 49.

J. H. SMITH, sworn, says:

I was Secretary to the land Commission & am custodian of the Records of the Land Commission I have the Records with me touching the matter in dispute. I refer to Land Commission No. 129, page 176 it contains the testimony relative to the lands in question which are marked in the bill as award 1602.

Mr. Davis interpreted the testimony as follows:

Kekualaula was sworn, & said upon my request to Kaikuawa in 1834; for your place that it may be my place, because that place was a place lying open or waste. Haia consented to it, & we fenced in the place—thereupon Kaniu went for it to the King—but I did not know it. Kaikuawa came to me & said our work is done, that place is gone from us to the King's nurse Kaniu, that is all that I know about it up to the present time that we are now in. There was one person Lokai knew something about this talk, but she did not get the thing, the King did not consent to it.

John Ii was sworn & said sometime recently before Kaniu obtained the place Haia had it—but he did not stop there but a short time when Haia was there only one house was built—I don't know who got it but I used to see Kaniu's people living there before the law, and I heard from the daughter of Haia that the King had given it to Kaniu & that it was accordingly gone.

Mr. SMITH re-examined:

There was no other testimony given in regard to those lots—Kinimaka was the claimant, I don't know of any counter claimant. The date of the foregoing testimony was taken in Oct. 1846. It sometimes turns out that the applicant to whom the land
44 had been awarded had merely been the Agent of other parties. After the notification in the Newspaper the claim was allowed, if no counter claimants appeared. After the death of Mr. Richard's *death* no deliberations were taken, each commissioner signed his award & it was signed by the others as a matter of course. There are 3 lots awarded in the one award.—They consist of two house lots on Punchbowl St. & one down by the beach.

Mr. SMITH re-examined:

It was customery to issue awards upon the mahele book that was conclusive, & no evidence was require. No. 7130 is the number of the award of Onouli Maloo (p. 161) to Kinimaka, based on the division. It was made upon the certificate of Thurston without any citation of witnesses to appear against it. This Onouli maloo was only one of a number of lands awarded on that Certificate. I should suppose that Onouli Maloo is the one that C. Kanaina was testifying to. There is only one land of that name.

PUNIWAI, sworn, says:

I knew Kinimaka, & David & Kaniu.—David lived out at Kaniu's place after her heath until I grew up to a considerable age.—I lived

there all the time I was a boy, & until a long time after I left school. I know all round the place until you come to a little pond. On the Ewa side the place abounds on a street that leads up to the Church, a Government St. & leads past the Punchbowl St. There is a fish-pond on the makai side the land goes to the fish pond. There are two houses on the lower side of it & then you come a little & there is a house where we brought David up, & then you come to two more houses, & then you come to a house that is not a house. The house where the Boy was brought up was formerly the chief house. It belongs to David. We the kanakas all knew that it was David's house.—Nawele, Kahina, & I brought up David. Nawele kept him after Kaniu died. Kinimaka was in some way connected with David by his marriage with Kaniu.—Kinimaka lived there under Kaniu & when she died we came in. Kinimaka lived on the place and looked out for it & we were the people under him. Kinimaka died on this place.—Kaniu was the first Lord of the place & then Kinimaka & we under him. According to Kaniu's will the place was David's but it was managed by Kinimaka.—The place was David's but Kinimaka had all to do with it.—Kinimaka thought the place was his, but Kaniu had willed it to David, but had instructed Kinimaka to take charge of it for David I was there at the time she instructed him. Kinimaka was agreeable to that arrangement. Kinimaka left 3 children, they are young of different sizes.

KAHINA, sworn, says:

I lived upon the land in question up to Kinimaka's death.—David lived there too. Kalakaua we look upon as the owner of the place. The place belonged to David & Kinimaka was a man under him. The way that Kinimaka had rights there was that he was Kaniu's death. That she willed the place to David & Kinimaka had charge of it for David. Kinimaka always declared to us that the place was David's & that he was to take charge of it while he, David, was young. Up to the time of Paki's death I never heard Kinimaka say the land was his, he might have laid claim for what I know but I never heard him say so. Kaniu was our chief—we were Kaniu's servants but after Kaniu's death Kinimaka was head man to take charge of the place for David. We considered David our Chief.

The Court adjourned until tomorrow at 10 o'clock.

(Signed) JNO. E. BARNARD,
Clerk Sup. Court.

46 19th Aug't, 1858.

The Court met pursuant to adjournment.

Mr. Harris was allowed to amend his Petition by after the figures No. — the words & figures "129 confirmed by Royal Patent."

Mr. Bates assented to the interlineation.

Mr. Bates made the following point—admitted that the land originally belonged to Kaniu who held it as the King's Konohiki.

That notice was given to the King of the death of Kaniu & of her having given her property to David. That at that time of the great division the King took back his title to the land. At that time nobody appeared to represent Kaniu. That the King was cognizant of the Will granting the land to David, but that when he delivered out the grants afresh he did not deliver one to David, but to Kinimaka. None of the Chiefs set up any claim for David, & when Kinimaka sent in his claim the King granted the lands to him.—That David's natural Guardians stood by & made no objection to their being granted to Kinimaka. That after its having been awarded to Kinimaka no appeal was taken against the award, and they were not estopped.

Mr. Harris produced the Record in the former case against Kinimaka to show that an action had been commenced against Kinimaka previous to his death.

Mr. Harris stated that Kinimaka having assented to his wife that he would take charge of the land for David. That at the time she gave the land to David, or to Kinimaka for David, the King had not the power to take the land from her, that he the King would only have been entitled to one third which was a sort of Legacy duty. That if Kaniu had any idea that Kinimaka would not take charge of it as Guardian, she would have passed it at once to David whom she had adopted, overlooking Kapaakea her son. That David never lived with his father Kapaakea, & he Kapaakea claims no authority over him. That he always lived with Kaniu until her death.—That Kinimaka having assumed the trusteeship was bound to make it know on every occasion. That David having held
47 a portion of Kaniu's land was possession of the whole. Claimed whatever was contained in Royal Patent 1602 of Land Comm. Award No. 129.

(Signed) JNO. E. BARNARD,
Clerk Supreme Court.

48 Supreme Court. In Equity.

Before Chief Justice E. H. Allen.

DAVID KALAKAUA
vs.
RICHARD ARMSTRONG, Guardian of Kaniu, David Leleo & Kinimaka, Minor Children of Kinimaka, Dec'd.

Now comes the Plaintiff in the above entitled cause, and in consideration of certain sums of money paid by Kinimaka during his life time, for his use and benefit—relinquishes all right to any and all lands now included in the Estate of the said Kinimaka—and set forth in the petition in the above entitled cause, and discontinue my action for the same saving and excepting the land of Onoulimalo in the Island of Molokai and the 1st Apana of land set forth in Royal Patent No. 1602—filed in the cause and discontinue my action, as set forth in my Bill of Complaint, in the above entitled

suit—except for the said land of Onoulimaloo—and for the Apana No. 1 Royal Patent No. 1602—herein above referred to.

(Signed) DAVID KALAKAUA.

Nov'b'r 2nd, 1858.
Supreme Court-room, Honolulu, Oahu.

49 Ex. N.

Supreme Court, at Chambers. In Equity.

Before Hon. E. H. Allen, Chief Justice.

2 Nov'r, 1858.

DAVID KALAKAUA
vs.
RICHARD ARMSTRONG, Guardian of Kaniu, David Leleo & Kinimaka, Minor Children of Kinimaka, Deceased.

The Court did order adjudge and decree in this matter that Mr. Armstrong, as Guardian of Kaniu, David Leleo, and Kinimaka, minor Children of Kinimaka deceased; do convey to David Kalakaua the plaintiff in this cause, the land named Omulimalo, on the Island of Molokai, and the first Apana of land set forth in Royal Patent No. 1602 filed in this cause.

(Signed) JNO. E. BARNARD,
Clerk Supreme Court.

50 Ex. O.

To the Hon. G. M. Robertson, Associate Justice after the Sup. Court:

The undersigned widow of Kinimaka of Honolulu lately deceased respectfully petitions your Honor to appoint a Guardian to assist her in the care and Education of her children being Minors during the period of their Minority—their names are Kaniu (a female child) David Leleo, Kinimaka, and she would respectfully suggest to your Honor as a fit and proper person for the Guardianship of the persons and the property of the above named children, Her friend Rev. Richard A. Armstrong.

PAI.

Honolulu, Apr. 24th, 1858.

51 **Ex. P.**

Supreme Court.

Before the Hon. G. M. Robertson, Associate Justice.

5 May, 1858.

In the Matter of the GUARDIAN OF THE MINOR HEIRS OF KINIMAKA, and Letters of Administration on the Estate.

Mr. R. G. Davis appeared for the Applicant Pai.

No person appeared to oppose the Application upon reading and filing the Petition of Pai the widow of the late Kinimaka for the appointment of an administrator upon his Estate in the room of Mr. G. E. Beckwith resigned and for the appointment of a Guardian to Kaniu, David Leleo and Kinimaka Minor Heirs of Kinimaka deceased due public notice having been given and no person appearing to oppose the application.

The Court did order that the Rev. R. Armstrong be appointed Administrator and Guardian as aforesaid upon his filing bond in the sum of One Thousand Dollars.

WILLIAM HUMPHREYS,
Assist. Clerk.

52 **Ex. Q.**

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

MARY H. ATCHERLEY, Plaintiff,

vs.

KAPIOLANI ESTATE, LIMITED, a Hawaiian Corporation; PANAILIKE, Kimo Keliimoeone, Kauka Hale, Mrs. Kaluahine Haina, Punahoa, Mahoe, Hugo K. Kawelo, Kaaipuaa, Residing at said Honolulu; Lewers and Cooke, Limited, a Hawaiian Corporation, and Abigail K. Campbell, Residing at said Honolulu, Defendants.

Complaint.

To the Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit, Territory of Hawaii:

The undersigned, Mary H. Atcherley, residing at Honolulu, Island of Oahu, Territory of Hawaii, complains of Kapiolani Estate, Limited, a Hawaiian corporation, Panailike, Kimo Keliimoeone, Kauka Hale, Mrs. Kaluahine Haina, Punahoa, Mahoe, Hugo K. Kawelo, Kaipuaa, residing at said Honolulu, Lewers and Cooke, Limited, a Hawaiian corporation, and Abigail K. Campbell, residing at said Honolulu, that they have unjustly and contrary to law and the rights of the Plaintiff taken into their possession and converted to their use and occupation a parcel of land situated at Honuakaha, on Queen Street and Punchbowl Streets in Honolulu, Island of Oahu, Territory of Hawaii, containing an area of two and thirty two-hundredths acres and being the same land constitu-
53 ting Apana 1 of Royal Patent 1602 and Land Commission Award 129 and described by metes and bounds as follows:

Commencing at the south corner of Queen and Punchbowl streets and running

S. 68 W. 7 chains 42 3/12 feet to the mauka side of fish pond of H. Kalama, joining Punchbowl street; thence along the mauka edge of said pond

S. 52 E. 4 chains 50 2/12 feet to the west corner of the lot of Ke; thence

N. 47 E. 2 chains 29 feet;

N. 31 W. 23 9/12 feet; and

N. 47¾ E. 4 chains 2 8/12 feet; all these lines join in the house lot of Ke; thence

N. 49¼ W. 39 7/12 feet to commencement.

To the damage of said Plaintiff in the sum of Five Thousand Dollars.

Plaintiff claims a title in fee simple to said property by purchase from Moses Kapaakea Kinimaka, who obtained it by devise from Kinimaka, the original patentee.

Wherefore the Plaintiff asks process of this court to cite the said Defendants to appear and answer this complaint before a jury at the November Term, A. D. 1901, of this court, unless the same be sooner disposed of by judicial authority, and that the Plaintiff may have restitution of said property, with damage for its detention.

(Sig.) MARY H. ATCHERLEY.

54 TERRITORY OF HAWAII,
First Judicial Circuit, ss:

Mary H. Atcherley, being first duly sworn upon oath states that she is the Plaintiff in the above entitled case; that she knows the contents of the foregoing complaint by her subscribed and that the same are true.

MARY H. ATCHERLEY.

Subscribed and sworn to before me this twenty-ninth day of July A. D. 1901.

LYLE A. DICKEY,
Notary Public.

55 EXHIBIT Q.

Helu 129, Kinimaka.

Ua koi mai oia no kona mau wahi ma Honolulu no ka mea, ua loaa ia ia keia mau aina mai ka makahiki 1834, a ua noho keakea ole ia a hike i keia manawa.

Oia ka makou e hooko nei no Kinimaka he kuleana hoi kona malalo o ke Ano Alodio. Ina e uku mai oia i ko ke Aupuni hapaha, alaila ua kupono ia ia ka palapsala Sila Alodio.

Pono no nae ia ia ke uku no ka Hookolokolo a me ka Hooholo ana i ka olelo Penei,

	No ka rumi a me ke pai ana i ka olelo ma ka Nupepa	$1.00
Wm. L. Lee	No ke kope ana i ka olelo koina 2 Aoao..	1.00
J. H. Smith	No ka palapala kii.....	.50
S. M. Kamakau	No ka hana ana i ka la 24 Okatoba 1846.	1.00

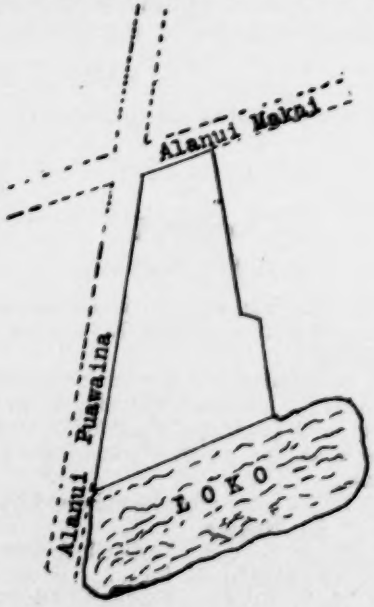
Z. Kaauwai Ioana Ii.	No ke kope ana i ka olelo a na hoiki 2 aoao	1.50
	No ke ana ana i ka la.....	2.50
	No ke kope ana.....	.50
	No ka hooholo ana i ka olelo Aperila 10, 1849	2.50
		$10.50

Eia ba palena
Anaia e D. KALANIKAHUA.

56 *Apana* 1.

Ke ano o ke ana ana i kekahi Apana pahale o Kinimaka ma Honolulu, i Oahu. Ma ka aoao makai o ke Alanui Makai ma ka aoao Hema hoi o ke Alanui Puawaina. E hoomaka ana i ke ana ana ma ka huina Hema, e hui ai ke Alanui Makai me ka Alanui Puawaina, A moe aku ka aoao Hema 68° Komohana 7 Kaulahao 42 3/13 Kapuai hiki ma ka aoao mauka o ka loko ia a H. Kalama, o pila ana no i ke Alanui Puawaina, huli a holo ma ka lihi mauka o ua loko la Hema 52° Hikina 4 Kaulahao 50 2/12 Kapuai hiki i ke kihi Komohana o ka pa o Ke e pili ana no i ka loko ia, huli Akau 47° Hikina 2 Kaulahao 29 Kapuai huli Akau 31° Komohana, a holo iki 23 9/12 Kapuai, huli Akau 47° 45′ Hikina 4 Kaulahao 2 8/12 Kapuai e pili ana ia pae aoao a pau i ka pahale o Ke, alaila huli kahi i hoomaka' i ke ana ana Akau 49° 15′ Komohana 1 Kaulahao 39 7/12 Kapuai.

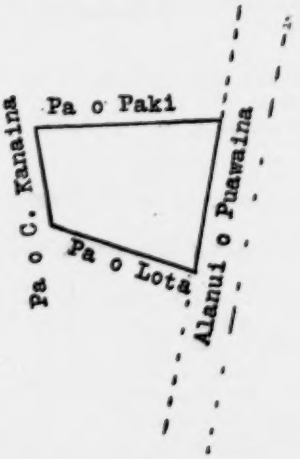
Eia ka ili 2 Eka 2 Kaulahao 26 Anana 15 Kapuai.



57 *Apana* 2.

Ke ano o ke ana ana i kekahi Apana pahale o Kinimaka ma Honolulu i Oahu ma ka Aoao Akau o ke Alanui Puawaina makai hoi o ka pa o Paki mauka iho hoi o ka pa o Lota. E hoomaka ana i ke ana ana ma ke kihi Hema o ka pa o Paki, ma ka aoao Akau hoi o ke Alanui Puawain, A moe aku ka aoao mua Akau 35° 30′ Komohana 2 kaulahao 45 6/12 Kapuai hiki i ke kihi Hikina o ka pa o C. Kanaina huli Hema 53° Komohana 1 Kaulahao 24 5/12 Kapuai hiki i ke kihi Akau o ka pa o Lota, huli Hema 14° 30′ Hikina 2 kaulahao 18 6/12 Kapuai hiki i ke kihi Hikina o ka pa o Lota, alaila huli i kahi i hoomaka′ i ke ana ana Akau 68° 15′ Hikina 2 kaulahao 18 6/12 Kapuai hiki i ke kihi Hikina o ka pa o Lota.

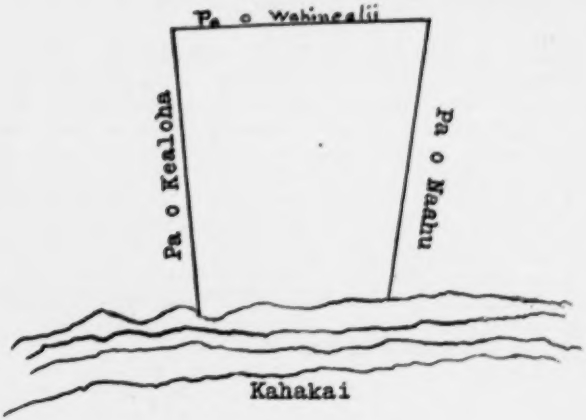
Eia ka ili 545 Anana 12 Kapuai.



58 *Apana* 3.

Kee kii o ka pahale o Kinimaka ma Honolulu i Oahu i pili ana i ke kahakai, aia makai iho o ka pa o Wahinealii ma Waikiki hoi o ka pa o Kealoha ma ewa hoi o ka pa o Maahu. E hoomaka ana i ke ana ana ma ke kihi hema o ka pa o Kealoha e pili ana i ke kahakai. A moe aku aoao mua akau 61° 30′ hikina 1 Kaulahao 60 9/12 kapuai, hiki i ke komohana o ka pa o Wahinealii, huli hema 22° 30′ Hikina i Kaulahao 21 9/12 kapuai, hiki i ke kihi hema 67° 30′ komohana 1 Kaulahao 53 6/12 kapuai hiki i ke kihi komohana o ka o Naahu e pili ana i ke kahakai, alaila huli i kahi i hoomaka′ i Akau 27° Komohana 1 Kaulahao 9 3/12 Kapuai.

Eia ke ili 278 Anana 11 Kapuai.



Pono nae iaia ke uku mai no hookolokolo ana a me ka hooholo ana iho i ka olelo penei.

No keia mau apana 2, 3..... $10.50

59 A true translation of which Award is as follows:

Number 129, *Kinimaka.*

He has claimed as his certain premises at Honolulu on the ground that he received these premises in the year 1834, and has had undisturbed possession up to this time.

In these lands we award to Kinimaka a freehold estate less than allodial. Should he pay the government commutation, a Patent will be issued to him in fee simple.

But it is proper for him to pay for the hearing and the deciding of the cl-im. Thus,

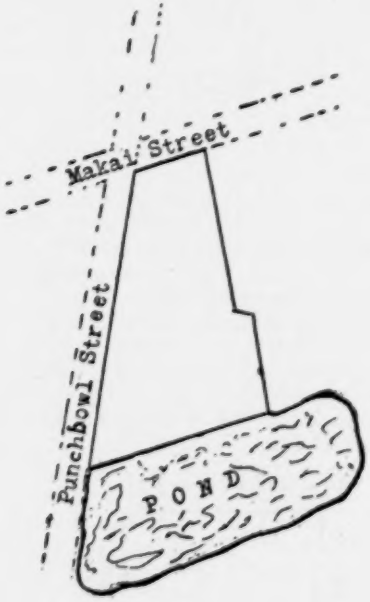
	For advertising the claim in the newspaper	$1.00
	For recording the claim 2 pages.....	1.00
Wm. L. Lee	For the diagram.....	.50
J. H. Smith	For working the 24th day of October 1846	1.00
S. M. Kamakau	For recording the testimony of the witnesses 2 pp.....	1.50
Z. Kaauwai	For surveying one day.....	2.50
Ioane Ii.	For recording	.50
	For deciding the claim April 10, 1849...	2.50
		10.50

These are the boundaries.
Survey by D. Kalanaikahua.

60 *Lot* 1.

Survey of a house lot of Kinimaka in Honolulu, Oahu, on the lower side of Makai St. and the south side of Punchbowl St. Beginning the survey at the south corner of the junction of Makai and Punchbowl streets and running, S. 68° W. 7 chains 42 3/12 feet to the upper side of the fish pond of H. Kalama, adjoining Punchbowl St. turn and run along the upper edge of said pond S. 52° E. 4 chains 50 2/12 ft. to the West corner, of the lot of Ke adjoining the fish pond; turn N. 47° E. 2 chains 29 ft. turn N. 31° W. and run a little, 23 9/12 feet, turn N. 47° 45′ E. 4 chains 2 8/12 ft. all those sides join the house lots of Ke; thence turn to place of beginning, N. 49° 15′ W. 1 chain 39 7/12 ft.

Area 2 acres 2 chains 28 fathoms, 15 feet.



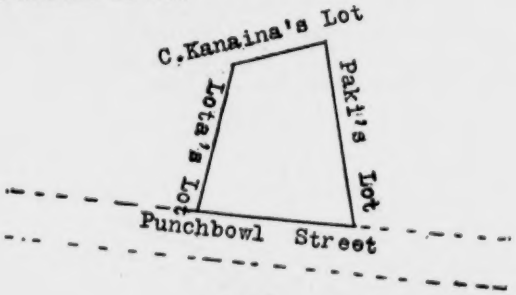
61 *Lot* 2.

Survey of a house lot of Kinimaka situate on the north side of Punchbowl St. and below the lot of Paki, and above the lot of Lota;

Beginning the survey on the South corner of the lot of Paki and the north side of Punchbowl St., the first side lies,

N. 35° 30′ W. 2 chains 45 6/12 ft. to the east corner of the lot of C. Kanaina turn S. 53° W. 1 chain 24 5/12 ft. to the north corner of the lot of Lota; turn S. 14° 30′ E. 2 chains 18 6/12 ft. to the south corner of the lot of Lota; then turn to place of beginning, N. 68° 15′ E. 2 chains 15 10/12 ft.

Area 545 fathoms 12 feet.



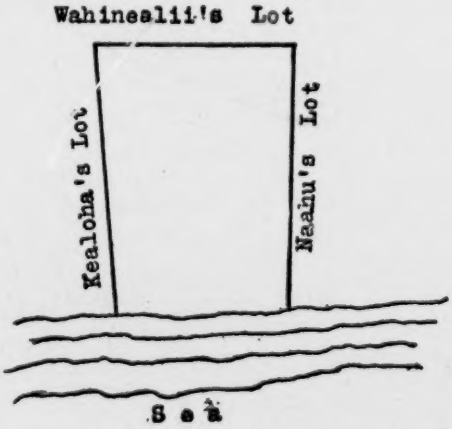
62 *Lot* 3.

The plan of the house lot of Kinimaka at Honolulu, Oahu, joining the beach which is makai of the lot of Wahinealii and Waikiki of the lot of Kealoha and Ewa of the lot of Naahu.

Beginning the survey at the south corner of the lot of Kealoha adjoining the beach the first side lies

N. 61° 30′ E. 1 chain 60 9/12 feet to the west side of the lot of Wahinealii; turn S. 22° 30′ E. 1 chain 21 9/12 feet to the south corner of the lot of Wahinealii; turn S. 67° 30′ W. 1 chain 53 6/12 feet to the west corner of Naahu adjoining the beach; thence turn to place of beginning, N. 27° W. 1 chain 9 3/12 feet.

Area 278 fathoms 11 feet.



It is proper for him to pay for the hearing and deciding the claim thus:

For these lots, 2, 3..... $10.50

63 EXHIBIT "R."

Helu 1602.

Palapala Sila Nui
A Ke Alii, Mamuli O Ka Olelo A Ka Poe Hoona Kuleana.

No ka mea, ua hooholo na Luna Hoona i na kumu kuleana aina i ka olelo, he luleana oiaoi ko Kinimaka Kuleana 129 ma ke ano Kuleana Nui malalo o ke ano alodio iloko o kahi i oleloia malalo, a no ka mea ua haawi mai o ua Kinimaka nei, iloko o ka Waihona Dala aupuni i kanawalu kumamalua 50/100 dala no ke aupuni Kuleana iloko o ia aina Nolaila, ma keia Palapala Sila Nui, ke hoike aku nei o Kamehameha 111 ke alii nui a ke Akua i kona lokomaikai; hoonoho ai maluna o ko Hawaii Pae Aina, i na kanaka a pau, i keia la, nona iho a no kona mau hope alii ua hoolilo, a ua haawi aku oia ma ke ano Alodio ia Kinimaka i kela wahi a pau loa ma Honolulu ma ka mokupuni o Oahu; penei na ma Ala Puawaina. E hoomak ana ma ka huina Hema o ke Ala Aliiwahine me ke Ala Puawaina. a e holo Hema 68° Kom. 7 Kaul. 42 3/12 Kapuai hiki i ka aoao mauka o ko loko ia a H. Kalama, e pili ana no i ke Alanui Puawania alaila ma ka lihi mauka o ia loko Hema 52° Hik. 4 kaul. 50 2/12 kapuai, hiki i ka kihi Kom. o ka pa o Ke, aiaila Akau 47° Hik. 2 Kaul. a Akau 47¾° Hik. 4 Kal. 2 8/12 kapuai, e pili Anaia po e aoao a pau i ka pahale o Ke. alaila Akau 49¼ Kom. 39 7/12 kapuai a hiki i ka hoomaka ana. 2.52 Ek. Apana 2 ma Ala Puawaina, E hoomaka ma ke kihi Hema o ka pa o Paki, ma ke aoao Akau hoi o ke Ala Puawaina, a e holo Akau 35½° Kom. 2 Kaul. 45 6/12 kapuai, hiki i ka pa o Kanaina, alaila Hema 53° Kom. 1 kaul 24 5/12 kapuai, hiki o ka pa o Lota, alaila Hema 14½ Hik. 2 kaul. 18 6/12 kapuai, hiki i ke ala Puawaina, alaila Akau 68¼ Hik. 2 Kaul. 15 10/12 kapuai a hiki i kahi i Hoomakai 545 anana. Apana 3, ma Kahakai E hoomaka ma ke kihi Hema o ka pa o Kealoha e pili ana ma kahakai, a holo Akau 61½ Hik. 1 kaul 60 9/12 kapuai hiki i kahi Kom. o ka pa o Wahinealii, alaila Hema 22½° Hik. 1 kaul. 21 9/12 kapuai hiki o ka pa o Naahu, alaila Hema 67½° Kom. 1 Kaul. 53 6/12 kapuai ma ia pa a hiki i kahakai, alaila Akau 27° Kom. 1 kaul. 9 3/12 kapuai, a hiki i kahi i hoomakai. 278 Anana.

Maloko o ia mau Apana 3.20 Eka a oi iki aku, a emi iki mai paha. Ua koe nae i ke aupuni na mine minerala a me na metala a pau No Kinimaka ua aina la i haawiia ma ke Ano Alodio a na kona hoolina a me kona waihona, ua pili nae ka auhau a ka Poe Ahaolelo e kau like ai ma na aina alodio i kela manawa i keia manawa.

A i mea e ikea 'i, ua kan wau i ko' u inoa, ame ka Sila Nui ko Hawaii pae Aina ma Hoolulu i keia la 30 o Augate, 1853.

Inoa: KAMEHAMEHA.

Inoa: KEONI ANA.

64 A true translation of which Royal Patent is as follows:

Number 1602.

Royal Patent of the King in Accordance with the Report of the Land Commissioners.

Whereas the Board of Commissioners to Quiet Land Titles has awarded to Kinimaka by Award No. 129 a freehold estate less than allodial in the premises mentioned below, and,

Whereas, Kinimaka has paid into the government treasury eighty-two and 50/100 Dollars for the government's rights in said land,

Therefore by this Royal Patent Kamehameha III, the Great King over the Hawaiian Islands by the Grace of the Lord, shows to all men this day for himself and his kingly successors that he has conveyed and granted in fee simple to Kinimaka that land at Honolulu on the Island of Oahu with these boundaries.

Lot 1 on Punchbowl St.

Commencing at the south corner of Queen and Punchbowl Streets and running; S. 68° W. 7 chains 42 3/12 feet to the upper side of the fishpond of H. Kalama adjoining Punchbowl St. thence along the upper edge of said pond; S. 52° E. 4 chains 50 2/12 ft. to the west corner of the lot of Ke; thence N. 47° E. 2 chains 29 ft. N. 31° W. 23 9/12 ft. and N. 47¾° E. 4 chains 2 8/12 ft.; all these sides join the houselot of Ke; thence N. 49¼° W. 39 7/12 ft. to commencement.

2.52 acres.

Lot 2 on Punchbowl St.

Commence at the south corner of the lot of Paki and north side of Punchbowl St. and run; N. 35½° W. 2 chains 45 6/12 ft. to the lot of Kanaina; thence S. 53° W. 1 chain 24 5/12 ft. to lot of Lota; thence S. 14½° E. 2 chains 15 10/12 ft. to place of commencement.

545 fathoms.

65 *Lot 3 at Beach.*

Commencing at the south corner at the lot of Kealoha adjoining the beach and running N. 61½° E. 1 chain 60 9/12 ft. to the west corner of the lot of Wahinealii, thence S. 22½° E. 1 chain 21 9/12 ft. to lot of Naahu; thence S. 67½° W. 1 chain 53 6/12 ft. along that lot to beach; thence N. 27° W. 1 chain 9 3/12 ft. to place of commencement.

278 fathoms.

Within these lots 3.20 acres more or less.

All mineral and metal mines are reserved to the Government. This land is Kinimaka's. It is granted in fee simple to him, his

heirs and devisees, subject however, to the tax laid by the legislature from time to time upon fee simple land.

In witness whereof I have put here my name and the great seal of the Hawaiian Islands this 30th day of August 1858.

Name: KAMEHAMEHA.
Name: KEONI ANA.

66 EXHIBIT S.

Copy of Transfer in Mahele Book.

"Ko Kamehameha.

Na Aina.	Ahupuaa.	Kalana.	Mokupuni.
Kukuiwaluhia	"	Kohala	Hawaii
Keahi	"	Hamakualoa	Maui
Aleamai	"	Hilo	Hawaii
Wainuku	"	Kau	Hawaii
Kahilipali	"	"	"
Ponahawai	"	Hilo	"
Kalaoa	"	Kona	"
½ Keana	"	Koolau	Oahu.

Ke ae aku nei au i keia mahele ua maikai.
No ka moi no aina i kakauia maluna aohe ou kuleana maloko.
KINIMAKA.

Hale alii, Feb. 9 1848.

A true translation of which is as follows:

"For Kamehameha.

The lands.	Ahupuaa.	Kalana.	Island.
Kukuiwaluhia	"	Kohala	Hawaii
Peahi	"	Hamakualoa	Maui
Aleamai	"	Hilo	Hawaii
Wainuku	"	Kau	"
Kahilipali	"	"	"
Ponahawai	"	Hilo	"
Kalaoa	"	Kona	"
½ Keana	"	Koolau-loa	Oahu.

I hereby assent to this division. It is good.
To the King are the lands above written, I have no right therein.
KINIMAKA.

Palace, Feb. 9, 1848.

67 "Ko Kinimaka.

Na Aina.	Ahupuaa.	Kalana.	Mokupuni.
Maihi	"	Kona	Hawaii
Kalahiki	"	"	"
Onouli malo	"		Molokai
½ Keana	"	Koolau Loa	Oahu

Ke ae aku nei au i keia mahele ua maikai.
No Kinimakana aina i kakauia maluna, ua ae ia aku e hiki ke lawe aku imua o ka Poe Hoona Kuleana.

KAMEHAMEHA.

Hale Alii, Febr. 9, 1848.

A true translation of which is as follows:

"For Kinimaka.

The lands.	Ahupuaa.	Kalana.	Island.
Maihi	"	Kona	Hawaii
Kalahiki	"	"	"
Onouli malo	"		Molokai
½ Keana	"	Koolau Loa	Oahu

I hereby assent to this division. It is good.
To Kinimaka are the lands above written. It is hereby allowed to take them before the Bo-rd of Commissioners.

KAMEHAMEHA.

Palace, Febr. 9, 1848.

68 *Statement of Claim and Evidence.*

Helu 129, Kinimaka.

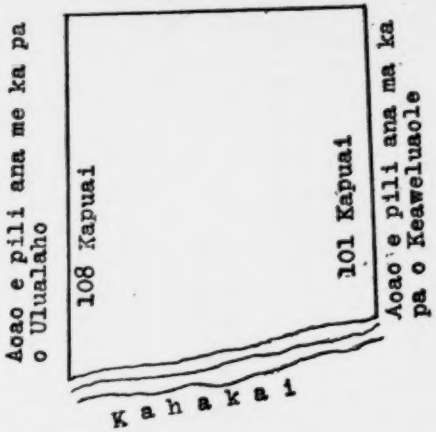
WAHI E NOHO AI,
HONOLULU, July 14, 1846.

Aloha oukou ka poe Hoona Kuleana mea Aina.
Eia mai ko 'u mau palapala ma Honolulu nei, a me ko lakou mau kuleana e maopopo ai no 'u keia mau pa. Aloha oukou.
Owau no me ka Mahalo ko oukou kauwa hoolohe,

KINIMAKA.

Kii 1.

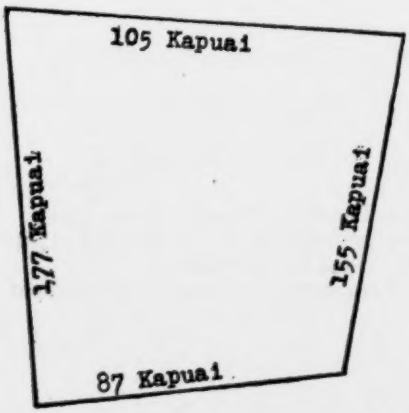
Aoao mauka pili ana me ka pa o Wahinealii.



Eia ke kuleana i keia wahi, mai a Leleahano, a ia Hewahewa, a ia Kapiiwi, a ia Kinimaka.

69

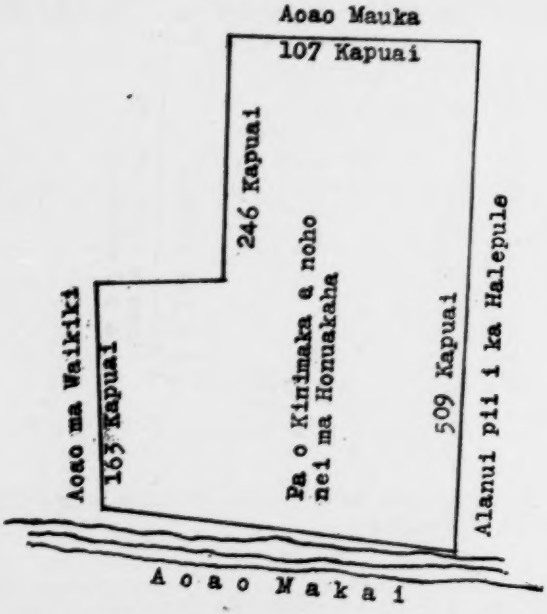
Kii 2.



Eia ke Kuleana o keia, wahi mai a Kauikeaouli a ia Kaniu, mai a Kaniu a ia Kinimaka.

KINIMAKA.

Kii 3.



Eia ke kuleana o ko 'u pa, no Liliha mai ko 'u o Kahikona ka hoike.

KINIMAKA.

70 of which a true translation is as follows:

Number 129, Kinimaka.

RESIDENCE.

HONOLULU, July 14, 1846.

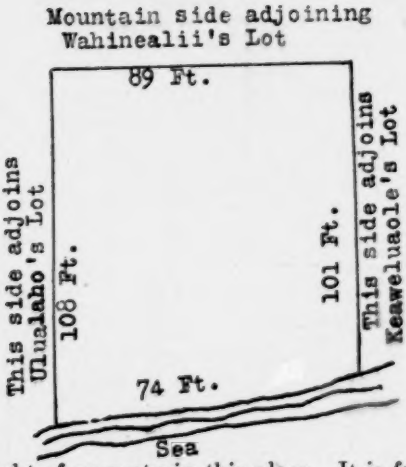
Greeting to the Board for Quieting Land Titles.

These are my houselots at Honolulu and rights therein that it may be clear that these lots are mine.

Love to you, I am with a blessing, Your obedient servant,

KINIMAKA.

Diagram 1.

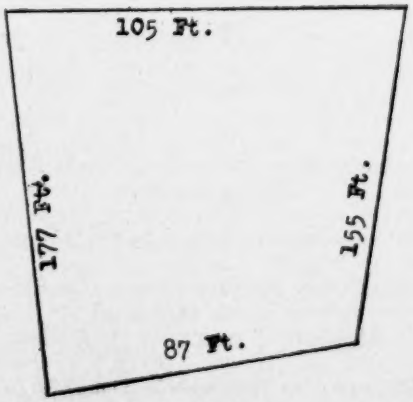


This is the right of property in this place. It is from Loleaheno to Hewahewa and to Kapiiwi and to Kinimaka.

KINIMAKA.

71

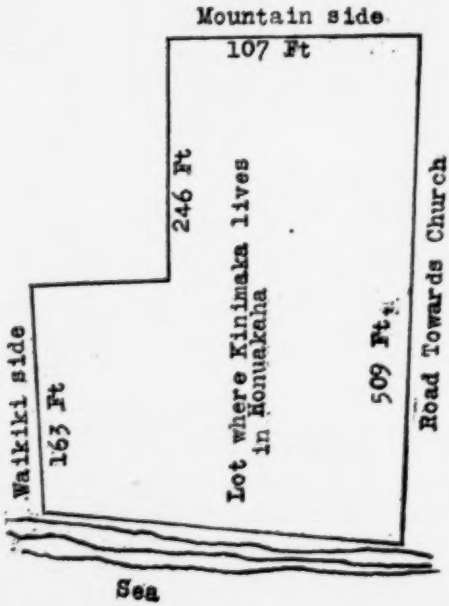
Diagram 2



This is the right of property in this place. It is from Kauikeouli to Kaniu and from Kaniu to Kinimaka.

KINIMAKA.

Diagram 3.



This is the right of property in this lot. It is mine from Liliha. Kahikona is the witness.

KINIMAKA.

72 Endorsed: Circuit Ct. 1st Circ't. In Equity Kapiolani Est. Ltd. vs. Mary H. Atcherley. Amended Bill For Injunction. E. 1246 18/40 Filed April 16, 1902. A. G. Kaulukon, Clerk.

73 In the Circuit Court of the First Circuit, Territory of Hawaii.
In Equity.

In Chambers.

KAPIOLANI ESTATE, LIMITED, Petitioner,
vs.
MARY H. ATCHERLEY, Defendant.

Defendant's Demurrer to Petitioner's Amended Bill of Complaint.

Now comes Mary H. Atcherley, the above named defendant, by Lyle A. Dickey, her attorney, and by protestation, not confessing or acknowledging all or any of the matters or things in the Peti-

tioner's Amended Bill of Complaint to be true in such manner or form as the same are therein set forth and alleged, does demur to the said Amended Bill of Complaint and for cause of demurrer shows that the Petitioner has not in and by said Amended Bill of Complaint made or stated such a cause as does or ought to entitle it to any such discovery or relief as is thereby sought and prayed for, from or against this defendant.

Wherefore this defendant demands the judgment of this Honorable Court whether she shall be compelled to make any further or other answer to the said Amended Bill of Complaint or any of the matters and things therein contained, and prays to be hence dismissed with her reasonable costs in this behalf most wrongfully sustained.

Honolulu, Island of Oahu, April 17, 1902.

MARY H. ATCHERLEY,
(Signed) By LYLE A. DICKEY,
Her Attorney.

74 Endorsed: Circuit Court, First Circuit In Equity. Kapiolani Estate Limited, vs. Mary H. Atcherley. Defendant's Demurrer to Amended Bill of Complaint. E. 1246 18/410 Filed April 17 1902 (Signed) J. A. Thompson, Clerk. Lyle A. Dickey, Att'y for Def't.

75 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. In Equity.

At Chambers.

KAPIOLANI ESTATE, LTD., Plaintiff,
vs.
MARY H. ATCHERLEY, Defendant.

Bill for Injunction.

Decree.

Pursuant to a stipulation on file in this suit between the parties hereto, it is hereby Adjudged and Decreed, upon plaintiff's bill of complaint and defendant's demurrer thereto, that plaintiff's amended bill of complaint herein be dismissed, without prejudice, however, to plaintiff's right to file another bill of complaint against the defendant herein setting up any and all matters whatsoever as it, the plaintiff, may see fit, excepting only matters claimed to be res judicata between the parties hereto as set up in the plaintiff's bill of complaint herein. Costs to be taxed against plaintiff.

(Signed) A. S. HUMPHREYS,
First Judge of the Circuit Court, First Judicial Circuit, Sitting in Chambers, in Equity.

Dated, Honolulu, April 18th A. D. 1902.

O. K.
LYLE A. DICKEY.

Endorsed: Circuit Court 1st Circuit Kapiolani Estate Ltd. vs. Mary H. Atcherley Decree Filed April 19, 1902 A. G. Kaulukou, Clerk.

76 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. In Equity.

At Chambers.

KAPIOLANI ESTATE, LIMITED, Plaintiff,
vs.
MARY H. ATCHERLEY, Defendant.

Bill for Injunction.

Plaintiff's Appeal.

Plaintiff in the above entitled cause hereby gives notice of its intention to appeal and hereby does appeal to the Supreme Court of the Territory of Hawaii from the decree made and entered herein on April 18th, A. D. 1902, dismissing plaintiff's amended bill of complaint.

KAPIOLANI ESTATE, LTD.,
(Signed) By its Att'ys, KINNEY, BALLOU & McCLANAHAN.

Dated, Honolulu, April 18th, A. D. 1902.

Endorsed: Circuit Court 1st Circuit Kapiolani Estate, Ltd. vs. Mary H. Atcherley Plaintiff's Appeal Filed April 19, 1902. H. G. Kaulukou, Clerk.

77 In the Supreme Court of the Territory of Hawaii, October Term, 1902.

KAPIOLANI ESTATE, LTD.,
v.
MARY H. ATCHERLEY.

Appeal from Circuit Judge, First Circuit.

Submitted October 9, 1902. Decided April 7, 1903.

Frear, C. J., Galbraith and Perry, JJ.

If a decree is not clear or is ambiguous in its terms, it may be construed in the light of the averments and prayer of the bill and avertments of the answer and of the remainder of the record.

A decree that A "as guardian of K. D. and M." Minors, do convey to D. K. certain lands named, held, in the light of the pleadings and the remainder of the record, to be an order for the conveyance of the interests of the minors.

In a suit in equity brought to enforce a former decree of a court of equity, the respondent by demurrer questioned the validity and the correctness of the original decree. Held, that the attack thus made is collateral and not direct.

Upon collateral attack, mere errors or irregularities cannot be taken advantage of.

A decree rendered in 1858, requiring a guardian to execute a conveyance of land of his wards, minors, upheld, although it appeared that in the original suit the guardian as such, and not the minors, was named as the party defendant and that service of summons was made on the guardian as such and not on the minors themselves.

While upon a bill to carry a decree into execution, the court may re-examine the propriety of the original decree, still it is not bound to do so in all cases. Where no fraud is alleged in obtaining the original decree,—declaring a trust and ordering a conveyance to the cestui que trust—and that decree is not incomplete, was adversary and not by consent, was rendered more than forty years prior to the request for re-examination and was followed during the whole of that period by sole and undisputed possession of the land by the complainant and his successors in interest, the decree should not be opened up,

Opinion of the Court by Perry, J.

(Galbraith, J., Dissenting.)

This is a bill to enforce a decree in equity rendered by the Honorable E. H. Allen, Chief Justice of the Supreme Court of Law and Equity of the Hawaiian Islands, in Chambers, on November 2, 1858, by which decree it was ordered "That Mr. Armstrong, as Guardian of Kaniu, David Leleo and Kinimaka, minor children of Kinimaka, deceased, do convey to David Kalakaua, the plaintiff in this cause, the land named Omulimalo on the Island of Molokai, and the first apana of land set forth in Royal Patent No. 1602 filed in this cause." The prayer is that the respondent be permanently enjoined from prosecuting an action at law instituted by her to recover
78 possession of Apana 1 of R. P. 1602, L. C. A. 129, and from bringing any other proceedings for the same purpose, and that she be decreed to be the trustee of all the right, title and interest of Kaniu, David Leleo, and Moses Kanaakea Kinimaka in and to the land described for the benefit of the complainant and as such trustee be ordered to convey all such interests to the complainant. A demurrer to the bill, on the ground that no cause of action was stated, was sustained pro forma and the bill dismissed. From that order the complainant appeals.

The main question is whether the respondent is bound by the decree of 1858. The essential facts, stated in detail in the bill are as follows:

On December 29, 1856, David Kalakaua filed a bill in equity, in the court on this island then having jurisdiction in such matters, against one Kinimaka. In that bill he alleged, in substance, that

he was born in 1836, that prior to 1844 he lived with one Kaniu, a chiefess, as her adopted child according to the custom of the country; that Kaniu was seized of certain rights, hereditary and other, in certain named lands, about thirteen in number, situate within the kingdom and including that of Onoulimaloo, Molokai, and the apanas, house-lots in Honolulu, described in L. C. A. 129; that Kaniu died in 1844, leaving her husband, Kinimaka, the respondent, but no issue; that on the day of her death Kaniu made an oral will, good according to the custom of the country, whereby she appointed the complainant her heir and left to him all her property; that during the session of the Board of Land Commissioners to Quiet Land Titles, Kinimaka procured to be awarded to himself four of the lands named, including the house-lots in Honolulu. Certain other facts were also set forth by virtue of which Kalakaua claimed that Kinimaka held the legal title to the lands in trust for him and a decree was prayed for declaring such trust.

Upon the filing of that bill a summons in the ordinary form
79 was issued and served upon Kinimaka. The latter, however, died on January 24, 1857, without having answered the bill. On March 16, 1857, under the title of the original suit, Kalakaua filed a suggestion of the death of Kinimaka and of his leaving "as heirs by will" his three minor children. Kaniu, D. Leleo and Moses Kapaakea, and prayed that the heirs be made parties to the bill, that a guardian ad litem be appointed for them and that a time be set for the further hearing of the cause.

March 6, 1858, Kalakaua filed a petition in probate for proof of Kaniu's oral will and for his appointment as administrator of her estate. At the petitioner's request a guardian ad litem was appointed to represent the three minors in that proceeding and citation was issued to Pai, widow of Kinimaka, and George E. Beckwith as administrator of the latter's estate and also as guardian ad litem of the minors. Further proceedings having been had, the probate court, on May 3, 1858, gave judgment to the effect that the verbal will was duly proven and that letters testamentary thereon be issued to Kalakaua.

Upon petition of Pai, filed April 24, 1858, Richard Armstrong was appointed administrator of the estate of Kinimaka in place of G. E. Beckwith, resigned, and guardian of the persons and property of Kaniu, David Leleo and Kinimaka, the minors.

On July 19, 1858, a bill in equity was filed by Kalakaua averring substantially the same facts as were set forth in the bill of December, 1856, adding, however, an averment of the probate of the will of Kaniu, and praying for similar relief; but of the lands described in the earlier bill a part only, to wit, two house-lots awarded by L. C. A. 129, R. P. 1602, and the ahupuaa of Onoulimaloo, L. C. A. 7130, was made the subject of the later one and a taro patch at Kaaleo, Oahu, L. C. A. 7130, not referred to in the first bill was included in the second. The concluding por-
80 tion of the bill of 1858 reads: "And your orator would further represent, that the said Kinimaka, at the time of his decease, left a widow, by name Pai, and minor children by name

Kaniu, David Leleo and Kinimaka, who by law succeed to the rights of the said Kinimaka, for which said children R. B. Armstrong, D. D., has been appointed guardian. And your orator, respectfully representing that he can have no remedy in the premises, except in a court of equity, humbly prays that the said Pai and the guardian of the said children, may be summoned to show cause, at such time and place as may be most convenient for your Honorable Court why it should not be decreed that the lands, hereinbefore mentioned, of right belong to your orator. And your orator further prays that it may be decreed that the said Kinimaka did, during his lifetime, procure the award, and held possession of the before mentioned lands, for the use and benefit of your orator, and further that the said R. B. Armstrong, guardian of the said minor children of the said Kinimaka may be ordered to convey to your orator all the right, title and interest of the said children in the aforesaid lands; and further that the aforesaid Pai, widow as aforesaid of the said Kinimaka, deceased, may be ordered to convey to your orator, all her right, title and interest in and to the above-enumerated lands. And that such other orders and decrees may be made and passed in the premises, as may pertain to equity and good conscience, and may give relief to your orator in the premises." The process issued required the Marshal to summon "Pai (*w*) and Richard Armstrong (Guardian of Kaniu, Leleo and Kinimaka, minors) defendants," to appear, etc. Service of this summons was made upon Pai and upon Richard Armstrong.

To the bill of 1858 an answer was filed entitled "The Joint and Several Answers of Pai and Richard Armstrong, Guardians of Kaniu, David Leleo and Kinimaka, minors, Defendants, to the Bill of Complaint of David Kalakaua," and signed "Pai, Richard Armstrong, Guardian of Kaniu, David Leleo, Kinimaka, minors.
81 By Asher B. Bates, their Solicitor." But very little was admitted in this answer. Ignorance was expressed as to the truth of the main averments and the complainant was left to his proof of the same. It was, however, stated by the respondents as their belief that if the awards were wrongfully issued to Kinimaka, they were issued upon testimony produced to the Board of Commissioners to quiet land titles, which satisfied that Board that Kinimaka was entitled to such awards.

At the trial, counsel for the respondents presented the view that, assuming that the land originally belonged to Kaniu and that she attempted to pass it by will to Kalakaua, nevertheless the King, cognizant of these facts, took back at the time of the great division his title to the land and thereafter, through the Board of Land Commissioners, made a re-distribution and gave an award covering these lands to Kinimaka and none to David, and that, no appeal having been taken from the award, the latter was final and the complainant was estopped from re-examining the matter. Decision was reserved by the court. Thereafter, on November 2, 1858, the complainant filed a discontinuance of his suit except in so far as the same related to the land of Onoulimaloo, Molokai, and Apana 1

of R. P. 1602, and on the same day the final decree now sought to be enforced was made.

Kinimaka by will left his property to Kaniu for life, after him to David Leleo for life and after him the remainder in fee to Moses Kapaakea who was sometimes called Kinimaka in the proceedings under review. David Leleo died before Kaniu and Moses Kapaakea survived the two others. The defendant now holds, by purchase from Moses Kapaakea, whatever title the elder Kinimaka had to the land. The complainant is likewise the successor to all of the rights of D. Armstrong in the property. Richard Armstrong is now dead.

A question of lesser importance in the case may be disposed
82 of first, and that is, concerning the construction of the decree.

It is contended that the decree does not require a conveyance of the interest of the minors in the land or the giving of a deed in their name by the guardian. If the decree is not clear or is ambiguous in its terms, it may be read in the light of the averments and prayer of the bill and averments of the answer and of the remainder of the record. See Clay v. Hildebrand, 34 Kan. 694 (9 Pac. 466) Finnigan v. Manchester, 12 Ia. 521, 2; 5 Encycl. Pl. & Pr. 1064; Freeman on Judgments § 45; 1 Black on Judgments § 123. So read, there can be no doubt, it seems to us, that it was the intention of the court to order the conveyance of the interests of the minors. In our opinion that intention is sufficiently expressed in the decree.

The main contention in support of the demurrer is that the minors were not bound by the decree of 1858, because they were not themselves named as parties defendant in the suit.

In Meek v. Aswan, 7 Haw., 750, it was held that an action to recover rent due for use of a minor's land should be brought in the name of the minor by her guardian and not in the name of the guardian as such. The court said, inter alia; "In the case at bar, a guardian for the minor had been appointed by the Probate Court. How, then, should the suit be brought? The purpose of it was to collect rent due for use of the minor's land. It was the suit of the minor, and not that of the guardian. But the minor cannot make a contract with an attorney to bring a suit, and cannot personally bring a suit; therefore, he must act through some one, or by some one especially appointed by the court. The suit is nevertheless that of the minor.

"Analogous to this is a suit where the suitor is represented by an attorney in fact. The principal brings the action by the attorney in fact." It may be that this is the better rule, that it
83 should apply as well to actions against minors, that the weight of modern authority elsewhere is in support of this view and that such is the practice at the present day in this Territory. But, however that may be, we think that if, as contended for by the complainant, the contrary practice prevailed in our courts prior to the decision in the Aswan case, and the proceedings in Kalakaua v. Armstrong, Guardian, and Pai were in accordance with that practice, the decree sought to be enforced should be held good and binding as against the minors.

In Meek v. Aswan, the court recognized the prior existence of a different practice. It said; "We are aware that a different practice has in many instances been followed in this court without objection, and suits have been instituted in the form of A. B. guardian of C. D." At the time of that decision (1889), the five members of the Supreme Court sat singly at nisi prius, exercising the jurisdiction and powers now vested in our Circuit Judges, and were therefore in a position to know what the practice in such matters was; and in this connection the ruling of Mr. Justice McCully, of the Supreme Court, who presided at the trial before the jury, is of great significance. The case had been instituted in the District Court of Honolulu where judgment had been rendered for the plaintiff. On appeal, after the jury had been empanelled and sworn and the plaintiff had opened the case, the defendant's counsel moved to dismiss on the ground that the action had been improperly brought in the name of the minor by her guardian and should have been brought by "G. S. Houghtailing, guardian of Eliza Meek." So thoroughly imbued with the past practice was the presiding justice, who afterwards joined in the decision sustaining the exceptions, that he held the declaration defective in respect to the party plaintiff and granted the motion to dismiss. It is interesting to note, in passing, that in the Aswan case the court said that the objection to the complaint, even if tenable, should not have been visited with a dismissal, but that an amendment should have been allowed,—
84 in other words, that the error, if any, was at most a mere irregularity and not one affecting the validity of the proceeding.

Formerly, by the common law of Hawaii, guardians possessed and exercised the absolute right to dispose of the real and personal estate of their wards, as might suit their own will. See preamble to Act of August 4, 1851, (Laws of 1851, p. 63): Laanui v. Puohu et al., 2 Haw. 161, 162; Thornton v. Bishop, 7 Haw. 431, 434, 435; Hoare v. Allen 13 Haw. 257, 261. It is not to be wondered at that the view as to the title of a guardian in the land of his ward and as to his powers generally growing out of those conditions, had not changed to any great extent during the few years next succeeding the enactment of the law of 1851 which abridged the rights and powers of guardians.

An examination of the records in some old cases referred to at the argument bears out the statement made in the Aswan decision as to the earlier practice.

In Law Case No. 627, 1856 and 1857, an action of ejectment, Kalama, the plaintiff, alleged in her declaration that Kekuanaoa and I "have wrongfully entered upon" certain land described—"as your petitioner understands claiming to hold the same on behalf of H. R. H. Victoria Kamamalu—but whether this last averment be true or not complainant does not of herself know." There was no other allegation in the least tending to establish a case against Victoria Kamamalu or from which the inference might be drawn that the two men were being sued as guardians of Victoria. The two answered, and Victoria filed a motion which was granted,

"that the cause may be discharged as against her, as the petitioner alleges no cause of action against her to which she can plead." Concerning this motion the clerk in his minutes says that "Mr. Bates moved that Victoria's name be stricken out as it was not pretended that she had any control over it, but merely her guardians for her benefit." This is the first reference to the two defendants as guardians but from the remainder of the record it is
85 apparent that it was regarded both by court and counsel that the defendants were being sued as guardians and in the title of the court's decision and of the appeal they are named as guardians. By stipulation of the parties, the court tried and determined the question of right and title to the land, that of damages to be submitted later, if necessary, to a jury or to referees, it being, however, the ward's right and title, and not that of the two men who were guardians, that was involved.

Ikalia (*k*) guardian of Kanakaokai Aikaula (*k*) v. Kopaea and others 1879, (Law No. 1463) Neil Campbell, Guardian of the persons and property of Kaua (*k*), Ana (*w*) and Kamaka (*k*) minors, and Emilia (*w*) and Neil Campbell, her husband, v. Manu, et al., 1881 (Law No. 1277). Naweli, Guardian for four minors named, v. Mary A. Auld and husband, 1881 (Law No. 1805) and A. F. Judd and S. B. Dole, Guardians of Airene H. Ii, a minor v. Kuanalewa, et al., 1881-1882 (Law No. 2032), were all actions of ejectment in which the title of the wards was tried and determined. In each case the guardian as such was named as the plaintiff, and not the ward by the guardian. So, too, in Equity case No. 568, tried in 1886 and 1887, the bill and all subsequent papers, including two decisions by Mr. Justice Preston, were entitled "Yim Quon v. A. J. Cartwright, Guardian of George Holt and Annie Holt, defendant."

These cases, while but few in number, are sufficient to show a practice different from that declared in the Aswan case to be the correct one, and counsel for the respondent, diligent and thorough as he has been in this case, has referred to but one to the contrary. That is the case of Metcalf v. Metcalf, Equity No. 251, (1859), in which the bill, without title, prayed that Emma Metcalf, a minor be ordered to convey to the complainant certain premises alleged to be held by her in trust for him. The clerk's minutes and the bill of costs are each entitled "Theophilus Metcalf v. Emma Metcalf" and the decree of the court, as noted by the clerk, was that "the said Emma Metcalf, minor defendant, do release and con-
86 vey * * * through her guardian ad litem J. W. Austin, Esq." On the other hand it may be noted that the complainant also prayed that "a guardian ad litem may be appointed by this Honorable Court who may be cited to appear and answer for the said Emma Metcalf and show cause if any there be why the prayer of this petition shall not be granted," that the order to the Marshal was to summon "J. W. Austin, Guardian ad litem for Emma Metcalf, defendant," that service was made as directed on the guardian, and that the respondent's answer was entitled "Theophilus Metcalf v. J. W. Austin, Guardian ad litem of Emma

Metcalf," and signed by "J. W. Austin, Guardian ad litem of Emma Metcalf."

It is true that in none of the cases cited by the present complainant does it appear that the question was specifically raised. Yet from the very silence of court and counsel can be implied acquiescence in that mode of procedure and approval of it. "Where a court has erroneously held that certain things were sufficient to give jurisdiction and title have been built thereon, the doctrine of stare decisis forbids the overruling of those decisions."—Van Fleet, Coll. Attack, p. 4. Decrees rendered during the period in question extending from forty-five or more years ago to fifteen years ago, settling the titles to real estate and made in conformity with a procedure then regarded as good and impliedly decided to give jurisdiction to the court and to bind the wards, should be now upheld, irrespective of any later change in procedure and even though the lawyers and judges of to-day think differently as to the correctness of the former practice.

If the defects complained of can be regarded, not as matters affecting the jurisdiction but as constituting at most mere error, certainly such error cannot be taken advantage of in this
87 case because the attack now made on the decree of 1858 is collateral and not direct. "A collateral attack is an attempt to impeach a judgment or decree in a proceeding not instituted for the express purpose of annulling, correcting or modifying such judgment or decree."—17 Am. & Eng. Ency. Law 2nd ed., 848. See also Morrill v. Morrill 20 Or. 96, 101; Nichols v. Smith 26 N. H. 298, 300. "The word 'collateral,'" in this connection, "is always used as the antithesis of 'direct,' and it is therefore wide enough to embrace any independent proceeding. To constitute a direct attack upon a judgment, it is said, it is necessary that a proceeding be instituted for that very purpose. If an appeal is taken from a judgment, or a writ of error, or if a motion is made to vacate or set it aside on account of some alleged irregularity, the attack is obviously direct, the sole object of the proceeding being to deny and disprove the apparent validity of the judgment. But if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral and falls within the rule"—1 Black on Judgments, Sec. 252. "A direct attack on a judicial proceeding is an attempt to avoid or correct it in some manner provided by law. * * * A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or to deny its force and effect in some manner not provided by law."—Van Fleet, Collateral Attack, pp. 4, 5. Under either of these definitions,—we have not found any essentially different—the present attack is collateral. The complainant's bill has for its sole object the enforcement of the decree and necessarily proceeds on the assumption that that decree is not made in any manner provided by law nor in a proceeding instituted expressly for that purpose. "An attack on a judgment in a proceed-

ing to revive it is a collateral attack."—Sharon v. Terry, 36 Fed. 337, 346. See also 1 Black on Judgments, Sec. 252.

88 Service of summons in the case of Kalakaua v. Armstrong was made on the guardian and not on the minors themselves. The same procedure was followed in Metcalf v. Metcalf and in Yim Quon v. Cartwright, and is not unsupported by precedents elsewhere or in reason. The minors in this case were, in 1858, about eleven, seven and one year old respectively. Service on them would be, in reality, a worthless form. After service it is the guardian who acts and who conducts the whole defense; the ward does nothing and can do nothing. True, in theory, such service would serve to notify their parents or others standing in loco parentis of the institution of the suit. That purpose was in fact accomplished in this case for their mother, Pae, was herself a defendant and the guardian appointed at her request was also served. General guardians are by our statute, Section 1970, C. L., authorized and required to "appear for and represent" the ward "in all legal suits and proceedings, unless where another person is appointed for that purpose, as guardian or next friend." A guardian might, perhaps, under this provision, waive service upon a minor defendant and enter an appearance and thereby bind the minor. That there is a difference of authorities as to whether a judgment against a minor without service on him is absolutely void for want of jurisdiction or is merely voidable and so immune from collateral attack, is conceded by respondent. The point as to lack of service is relied upon by her only to the extent of showing that for that reason the decree was erroneous and should not be now enforced.

The old decree is claimed by respondent to be erroneous for the further reason that upon the facts and the evidence adduced in that proceeding in 1858, the court erred in holding that Kinimaka, and after him his heirs, was a trustee of the legal title for the benefit of Kalakaua. The contention of the respondent is that because of these two alleged errors last mentioned, to wit, the lack of service and upon the merits, the court should refuse to enforce the decree.

89 It is not contended that the court must in all such cases re-examine the former proceedings but merely that it may, in its discretion, do so. Assuming that to be so, we decline to re-try the old case. The guardian appeared and contested the complainant's claim, presenting in opposition substantially the same views now sought to be urged by the respondent. The ward's interests were not permitted to go by default but were fully defended by counsel. The decree, while not carried out by the execution of a conveyance, was in fact acquiesced in, as appears by the bill, by all concerned and complainant and his successors in interest from that time continuously until about January, 1900, held open, notorious and undisturbed possession of the land. Under the circumstances, and after a lapse of more than forty years, we do not think that the court should examine into the merits of the former proceedings or refuse to enforce the decree for the reasons suggested.

As to whether the bill of 1858 was a continuation, by revival,

of the proceedings instituted in 1856, or was the commencement of a new and independent suit, we express no opinion.

The decree appealed from is reversed and the cause remanded to the Circuit Judge for such further proceedings as may be proper.

(Signed) A. PERRY.

Kinney, Ballon & McClanahan and H. A. Bigelow for the complainant.

L. A. Dickey for the respondent.

Concurring opinion of FREAR, *C. J.*:

I concur in general in the reasoning and conclusions of the foregoing opinion.

It is true, as held in Lawrence Mf'g Co. v. Janesville Mills, 138 U. S. 552, that "where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill," but that does not mean that the former decree should
90 be opened up in all cases. As a rule it is not opened up where, as here, so long a time has elapsed since it was made and where no fraud is alleged in obtaining it and where it is not incomplete and where it was adversary and not by consent. The case just cited from the Federal Supreme Court was brought to piece out a decree that was both incomplete and by consent. As the court said: "The prior decree was the consequence of the consent and not of the judgment of the court, and this being so, the court had the right to decline to treat it as res adjudicata." And in Buchanan v. Knoxville & O. R. Co. 71 Fed Rep. 324, the United States Circuit Court of Appeals for the Sixth Circuit distinguished that case, and, after pointing out that it was a case to piece out an incomplete consent decree and quoting from it the language first above quoted herein, said: "That is a very different case from that of a party who stands on a complete decree, and seeks no other benefit or advantage than that which is due by the general law from a former judgment." In the present case it would be practically impossible, owing to lapse of time and the deaths of witnesses, to go into the merits of the former decree, and the plaintiff and its predecessors have been in possession and enjoyed the benefits of that decree without question for more than forty years.

The question whether the guardian or the minors should have been made parties and served in the former case can hardly be said to be involved. We may assume not only, as was perhaps held by implication in Meek v. Aswan 7 Haw. 750, that it would have been correct practice to have made the minors defendants and to have served them, but also that it was incorrect practice to make the guardian the party defendant and serve him alone. Still, if that is only a question of error, and not of jurisdiction, it cannot be raised on a collateral attack. There can be no doubt that this attack is collateral. The only question, therefore, is whether the court in the former case merely committed error or was entirely
91 without jurisdiction, whether the decree was absolutely void or merely voidable on direct attack. The Meek case was one

of direct attack and the court seemed to intimate the- the irregularity complained of, if well founded, was one of error rather than of jurisdiction. In McAnear v. Epperson, 54 Tex. 220, in which a judgment was attacked collaterally on the ground that it was void because no service had been made on the minor defendants, the court said: "After a careful and extended examination of many cases in addition to those cited by counsel, in which the judgments in adversary proceedings, like the one now under consideration, were sought to be set aside because the minor defendants, although represented by guardians ad litem, had not been personally cited, we indorse this remark of Judge Hitchco-k's in Robb v. Irwin: 'Much is said in the books upon the subject. But I appehend it will be found upon examination that decrees entered under such circumstances are generally, if not universally, holden to be voidable, not void.' 15 Ohio 699; Preston v. Dunn, 25 Ala. 507; Nelson v. Moon, 3 McLean's C. C., 319; Day v. Kerr, 7 Mo., 426; Sheldon v. Newton, 3 Ohio St., 504. * * *

We are of opinion, upon the weight of authority, that a failure to cite the minor defendants personally in suit No. 2103, they having been defendant by a guardian ad litem, however sufficiently erroneous to have caused a reversal of the judgment against them on direct proceedings, was not such fatal defect as would render the judgment as absolutely void, so that it can be successfully impeached on a collateral attack." In Dampier v. McCall, 78 Ga. 687 (3 S. E. 563), the court went so far as to decline to interfere even on direct attack where service had been made on the guardian alone. See also as bearing on this general question, Smith v. McDonald, 42 Cal. 484; Lessee v. Lowe, 18 Oh. 368; McFarland v. Febiger's Heirs, 7 Oh. 198; White v. Albertson, 14 N. C. 241; Gotendorf v. Goldschmidt, 83 N. Y. 112; Doe v. Litherberry, 4 McClean 442; Ankeny v. Blackiston, 7 Or. 407; Jongsma v. Pfiel, 9 Ves. 357; 1 Dan. Ch. Pl. & Pr. 444, note 6. It is
92 true these cases relate to the question of service of process rather than to that of parties of record, but the former would seem to be the more important of the two questions. If the principle contended for is correct, it would seem quite as important that the minors should be personally served as that the defendant should be "A minor, by B guardian" instead of "B guardian, for A, minor." No instance has been cited in which a decree made under either of these circumstances has been held void on collateral attack. The question is not whether Meek v. Aswan shall be followed or whether the matter is stare decisis in view of the former pactice. To hold that the question is one of error rather than of jurisdiction, and so that the decree is not subject to collateral attack, is in entire harmony with the decision in Meek v. Aswan; and former practice, as regarded in a number of the cases above cited, greatly emphasizes the propriety of upholding former decrees as far as possible under circumstances like the present.

(Signed) W. F. FREAR.

Dissenting opinion of GALBRAITH, *J.*:

I do not concur in the argument or conclusion announced in the foregoing opinion.

The rule recognized by the Supreme Court of the United States, and absolutely binding on the Courts of this Territory, is that, "where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill." Lawrence Mf'g Company v. Janesville Cotton Mill, 138 U. S. 552, 561.

This rule clearly gave the trial court the power in hearing the bill to open up and re-examine the decree of 1858, and, it seems to me, that with the possession of the power there was an implied duty to exercise it. Aside from this consideration a decree that has been permitted to remain dormant for 44 years needs a "clear bill of health" to enable the doctrine of stare decisis to be invoked in its behalf and to authorize a court after so long a time to decree its specific performance.

93 This decree of 1858 did not divest the respondent's grantor of the legal title to the property in dispute, nor did it pretend to do so. It merely ordered Armstrong, as guardian, to convey the property. This he did not do. Why we do not know. The fact that complainant and its grantor remained passive so far as this decree was concerned for all these years while the legal title to property was in another and took no step to force a conveyance of title under the decree is difficult to reconcile with the claim that they felt secure in the legality of the decree. I do not deem it necessary to go into the merits of this decree further than to state that there is sufficient on the face of the bill to raise a serious question in my mind as to its correctness.

I do not consider the claim well taken that the respondent and her predecessor in title "acquiesced" in this decree by the fact that no action was taken to have the same reversed or set aside. They were not compelled to take the initiative or to do anything, so long as no attempt to execute the decree was made. The decree was harmless to them so long as no attempt was made to enforce it. The burden of action was on the complainant. The legal title was in the respondents' grantor and so long as nothing was done to compel him or them to convey, his, or their, inaction, cannot be said to be "acquiescence" to her prejudice.

The doctrine of stare decisis has been invoked in behalf of this decree. It seems to me that this doctrine will prohibit the granting of the prayer of the bill. Blackstone says relative to this doctrine, "For it is an established rule to abide by former precedents. Where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule which it is not in the breast of any subsequent judge to alter or vary from according to

his private sentiment; he being sworn to determine, not
94 according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one." 1 Blackstone 69.

I understand that it is the "former precedents" of this Court not the uncertain precedents of the Circuit Court (which can only be ascertained by a tedious search of the files of that Court) that this Court should "abide by" and that it is in this way that we may "keep the scale of justice even and steady and not liable to waver with every new judge's opinion."

This court has decided in a suit by a minor to collect rent due, that the action should be commenced in the name of the minor by its guardian. (Meek v. Aswan, 7 Haw. 750). The converse of this proposition is that a suit against a minor should be against him by his guardian and not against his guardian alone. This is admitted so far as this case is concerned. "It may be that this is the better rule, that it should apply as well to actions against minors, that the weight of modern authorities, elsewhere is in support of this view and that such is the practice at the present day in this Territory." Notwithstanding this admission the decision in the Aswan case is not followed, nor is it overruled, in express terms, for the reason that a "contrary practice prevailed in our Courts prior to the decision in the Aswan case." This "contrary practice" may have been permissible prior to the decision in the Aswan case but that decision having declared the practice wrong we cannot now approve of such practice without overruling that case. That case ought not to be overruled for the reason that it is good law and is supported by the great current of judicial authority elsewhere.

Again what is the evidence of this contrary practice? No decisions were cited in this jurisdiction to support it. We are referred to the files of some seven or eight cases in the Circuit Court where the papers are entitled as were those in the case in which the
95 decree in question was rendered. It is not contended that the correctness of the procedure was raised in any of these cases or that the ruling of a Circuit Judge supported it, but it is contended that there was an "implied acquiescence" in the practice "from the very silence of the Court and counsel." So we have only the "implied acquiescence" of the Court and counsel in seven or eight cases in the Circuit Court extending over a period of thirty or forty years to support the majority of the Court in refusing to follow the decision of this Court rendered at a time when the Court was composed of five judges. This reasoning followed to its logical conclusion, it seems, would prevent this Court from overruling a practice or procedure of the Circuit Court no matter how erroneous provided "court and counsel" had by silence acquiesced in it in a few cases, extending over a number of years.

Again the practice of digging up the files of the Circuit Court and referring to them to establish a practice or procedure does not appeal to me very strongly. There is enough difficulty in determining such questions when reference is made to reported cases where

the evidence of the question passed upon is supposed to be preserved in practicable form. To search through a lot of files of the trial court and examine the entitling of the papers and the endorsement on the summons is not in any way a satisfactory method to establish a question of procedure let alone to justify an appelate court in passing by one of its own solemn decisions.

The heirs of Kinimaka were the real parties in interest in the suit resulting in the decree of 1858 and sought to be enforced by the bill. These heirs were not made parties to that suit, were not served with process therein and made no appearance, although their guardian was a party, was served and appeared and contested the cause, still the heirs were not parties and were not bound by the decree nor is the respondent in this case and the decree ought not to be enforced without a retrial of the cause.

96 The decree sustaining the demurrer to the bill should be affirmed, and the appeal dismissed.

(Signed) C. A. GALBRAITH.

Endorsed: 1246, Supreme Court, Territory of Hawaii. Kapiolani Estate vs. Mary H. Atcherley. Decision. Filed April 7, 1903. (S.) George Lucas, Clerk.

97 In the Supreme Court of the Territory of Hawaii.

THE KAPIOLANI ESTATE, LIMITED, Plaintiff,
vs.
MARY H. ATCHERLEY et al., Defendants.

Petition for Injunction.

Remittitur.

Whereas, this cause has been duly argued and submitted to this Court, and whereas this Court in its decision therein rendered April 7th, 1903, reversed the decree of the lower court appealed from and remanded the said cause to the Circuit Judge for such further proceedings as might be proper.

Now therefore, it is hereby ordered that this cause be, and the same is, hereby remitted to the Circuit Court of the First Judicial Circuit, for further proceedings in the same in accordance with the decision of this Court hereinbefore mentioned.

THE SUPREME COURT OF THE
TERRITORY OF HAWAII,

(Signed) By HENRY SMITH, *Its Clerk.*

Dated, Honolulu, April 13th, 1903.

Endorsed: Supreme Court, Territory of Hawaii. The Kapiolani Est. Ltd. vs. Mary H. Atcherley, et al. Remittitur. Issued April 14, 1903. (Signed) Henry Smith, Clerk. Filed April 14, 1903. (Signed) Henry Smith, Clerk. Kinney, McClanahan & Bigelow, Judd Bldg.

98 In the Circuit Court of the First Circuit, Territory of Hawaii.
at Chambers.

In Equity.

KAPIOLANI ESTATE, LIMITED, a Corporation,
vs.
MARY H. ATCHERLEY, Defendant.

Answer to Amended Bill.

Mary H. Atcherley, the defendant in the above entitled cause now and at all times hereafter saving to herself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the Amended Bill of Petitioner contained, for answer thereto, or to so much thereof as the defendant is advised it is material or necessary for her to make answer to, answering says:

1.

That she denies that she is a resident of Honolulu and alleges that she is a resident of Waimea, Island of Hawaii, Territory of Hawaii.

2.

That she admits that on the thirty-first day of July A. D. 1901 said defendant herein filed an action of ejectment against the plaintiff herein with others as alleged in Section 2 of Petitioner's Amended Bill.

3.

That she admits that on or about the twenty-ninth day of December A. D. 1856 one David Kalakaua, under and through
99 whom Petitioner claims title to the land named in paragraph 2 of Petitioner's Amended Bill filed his petition in equity of the tenor of Exhibit A. of Petitioner's Amended Bill in the Supreme Court of the Hawaiian Islands.

4.

That she admits that a Summons was thereafter duly issued upon said petition and served and that Exhibit B. of petitioner's Amended Bill is a true copy thereof.

5.

That she admits that said Kinimaka died about January twenty-fourth A. D. 1857 after service without having filed any answer to said petition of December twenty-ninth A. D. 1856.

6.

That she admits that said Kinimaka left him surviving a widow Pai, and as devisees, three children, to wit, Kaniu Kinimaka, David Leleo Kinimaka and Moses Kapaakea Kinimaka, and that he devised the property in question to the three children, i. e. to Kaniu Kinimaka for life, then to David Leleo Kinimaka for life, remainder to Moses Kapaakea Kinimaka in fee simple.

7.

That she is ignorant but on information and belief denies that David Kalakaua ever made any such claim as is alleged in section 7 of Petitioner's Amended Bill save as such claim is contained in Exhibit C and Exhibit J of said Amended Bill.

8.

That she admits that on the sixteenth day of March A. D. 1857 said David Kalakaua by his attorney, Jas. W. Marsh, filed a suggestion in the Supreme Court of the Hawaiian Islands that the said Kinimaka had deceased before answering the above petition, leaving him surviving a widow, Pai, and three minor children, Kaniu, D. Leleo, and Moses Kapaakea as his heirs by will
100 and praying that they be made parties to the original suit and that a guardian be appointed for them and that Exhibit C. of Petitioner's Amended Bill is a true copy of said suggestion.

That she is informed and alleges as fact that there was never any hearing on said suggestion; that the prayers therein were never acted on; that no order making said minors — was ever made; that no guardian ad litem was ever appointed for them; that no notice was ever given them of the pendency of said suit; that they never entered their appearance in said suit nor did any one on their behalf and never filed any answer and that no decree was ever rendered in said suit against them.

9.

That she admits that on March eighth A. D. 1858, the said David Kalakaua filed a petition for the administration of the Estate of Kaniu, deceased, and for the appointment of an administrator and for the appointment of a guardian ad litem for Kaniu, D. Leleo and Moses Kapaakea, the minor children of Kinimaka, deceased, and that Exhibit D of Petitioner's Amended Bill is a true copy thereof

10.

That on information and belief she denies that any order was made upon reading and filing said petition for administration appointing a guardian ad litem of Kaniu, D. Leleo, and Moses Kapaakea, said minor children. And she alleges that said Kaniu owned no property at the time of her death and that said three minors were never served with process in said proceedings and

were not before the court at the time of the alleged appointmnt of a guardian ad litem.

11.

That on information and belief she admits that upon said petition for administration a summons was issued of the tenor of
101 Exhibit F of Petitioner's Amended Bill, citing George E. Beckwith, administrator of the estate of Kinimaka, deceased and guardian ad litem of his minor children, and Pai.

12.

That on information and belief she admits that a hearing was had upon said petition and evidence taken and admits that Exhibit G. of Petitioner's Amended Bill is a true copy of the minutes of the Clerk of the Court as to the proceedings and of his notes of the oral evidence taken. Whether or not such proceedings actually took place as therein set out and whether or not the clerk's notes of the evidence are correct she is ignorant and neither admits nor denies but leaves Petitioner to its proof thereof.

13.

That she admits that a decree of the tenor of Exhibit H. of Petitioner's Amended Bill was rendered in said cause by the Honorable G. M. Robertson and duly filed but claims that said judge had no jurisdiction to render said decree as the Board of Commissioners to Quiet Land Titles had exclusive jurisdiction to adjudge concerning private rights to land originating prior to A. D. 1846.

14.

That she admits that thereafter on May third A. D. 1858 letters testamentary were issued to the said David Kalakaua of the tenor of Exhibit I of Petitioner's Amended Bill; that she alleges that said David Kalakaua never acted under authority of said letters of administration; never filed an inventory; never filed an account as executor; never advertised notice to creditors; and never took possession of any property as executor.

15.

That she admits that on July nineteenth A. D. 1858 (not June as charged in section 15 of petitioner's Amended Bill) the
102 said David Kalakaua filed a further petition making some of the same allegations made in his petition of December twenty-ninth A. D. 1856 and his suggestion of March sixteenth A. D. 1857 with some additional allegations including an allegation that one Richard Armstrong had been appointed guardian of the minor children of said Kinimaka and praying among other prayers that he, the said Richard Armstrong, as such guardian, might be ordered to convey to the said David Kalakaua the land described in

section 2 of Petitioner's Amended Bill and admits that Exhibit J of Petitioner's Amended Bill is a true copy of said petition.

That she denies that said petition of July ninetenth A. D. 1858 alleges substantially the same facts as the petition of December twenty-ninth A. D. 1856 and the suggestion of March sixteenth A. D. 1857 and in particular says that whereas in the petition of December twenty-ninth A. D. 1856 it is alleged that said Kaniu died possessed of all houselots described in Land Commission Award No. 129 of which there are three, and of eleven other parcels of land, and that said Kinimaka was in wrongful possession of said three houselots, the lands of Maihi and Kalahiki on Hawaii, Onoulimaloo on Molokai and one-half Keana, in Koolauloa, Oahu; in the petition of July nineteenth A. D. 1858 there is no claim that Kaniu died possessed of or devised to Kalakaua more than one of said eleven lands, that of Onoulimaloo, there is only claim of two houselots of Land Commission Award No. 129 instead of all of them; and there is in the petition of July nineteenth A. D. 1858 an allegation that Kaniu owned a kalo patch at Kaaleo, Island of Oahu for which Kinimaka wrongfully obtained an award in his own name, an allegation not contained in either the petition of December twenty-ninth A. D. 1856 or in the suggestion of March sixteenth A. D. 1857; and that Moses Kapaakea through whom defendant derives title to the premises involved in this case was not
103 mentioned in said petition of July nineteenth A. D. 1858 as a child of Kinimaka.

16.

That she admits that upon said petition of July nineteenth A. D. 1858 a summons was duly issued and served upon said Richard as guardian of the minors named in said petition and upon Pai but not upon Richard Armstrong as guardian of Moses Kapaakea and she admits that Exhibit K of Petitioner's Amended Bill is a true copy of said summons.

17.

That she admits that said two defendants duly filed an answer of which Exhibit L of Petitioner's Amended Bill is a true copy.

That she alleges that said Richard Armstrong did not file said answer as guardian of Moses Kapaakea through whom defendant derives title to the premises involved in this case; that neither Kaniu, David Leleo nor Moses Kapaakea ever filed any answer to said petition nor did any one on their behalf; that said petition of July nineteenth A. D. 1858 was in no respect a continuance or revivor of the cause begun by the Petition of December twenty-ninth A. D. 1856 or a step taken in said cause but was the beginning of a different case, brought on different grounds and against different parties and with a different prayer for relief and relates to only three of the fourteen parcels of land involved in the petition of December twenty-ninth A. D. 1856 and relates to one parcel of land not involved in that petition.

18.

That she admits that thereafter upon August eighteenth A. D. 1858 in Chambers before the Honorable E. H. Allen, Chief Justice of the Supreme Court of the Kingdom of Hawaii, evidence was taken and the cause begun by the said petition of July nineteenth A. D. 1858 of David Kalakaua was heard or at least partially
104 heard on the merits and that Exhibit M of Petitioner's Amended Bill is a true copy of the minutes of the Clerk of the Court as to the proceedings and of his notes of the oral evidence taken. Whether or not said proceedings actually took place as therein set out and whether or not the clerk's notes of the evidence are correct she is ignorant and neither admits nor denies the same but leaves Petitioner to its proof thereof.

That she alleges that said exhibit M does not contain any record of the documentary evidence entered in the case; that it omits mention of Land Commission Award 129 and Royal Patent No. 1602 which were offered in evidence in said case and omits the heading of the testimony recorded in book 1 of testimony before the Board of Commissioners to Quiet Land Titles which testimony was interpreted in said case according to the third page of said exhibit M and which heading is as follows:

"Kinimaka
Kii 1 Aole i hanaia"

a true translation of which is as follows:

"Kinimaka
Diagram 1 Not yet acted on" and which was in evidence in said case.

19.

That she admits that on November second A. D. 1858 John E. Barnard, Clerk of the Supreme Court made an entry in his minutes of said day as set out in Exhibit N. of Petitioner's Amended Bill. That on information she denies that the Honorable E. H. Allen, Chief Justice, in Chambers ever rendered a decree on said day in said cause or that such a decree was ever duly entered upon the records of said Court; and she further shows that Moses Kapaakea, the minor child of said Kinimaka who later granted to defendant the premises involved in this suit is not named in said decree as alleged in section 19 of Petitioner's Amended
105 Bill; that he is not named in any of the pleadings or orders of said cause either as a party to the case or as a minor ward of Richard Armstrong, guardian. She is informed and believes and alleges as fact that said Kaniu never owned the premises involved in this case but they were given by Liliha, governess of Oahu to Kinimaka and were claimed by him before the Board of Commissioners to Quiet Land Titles on that ground, and that Kinimaka committed no fraud, deceit, or breach of trust in so claiming said premises and that they were rightly awarded to him by said Board of Commissioners to Quiet Land Titles; and that these facts would have been a protection to said Moses Kapaakea and his property if

proved on the said hearing on the merits upon said petition of July nineteenth A. D. 1858 of David Kalakaua; but that said Moses Kapaakea was given no notice or opportunity to be heard and to defend, protect and enforce his rights by establishing said facts and urging them upon the Court.

20.

That she admits that the said Richard Armstrong was in fact at that time the duly appointed Probate guardian of the minor children named in section 19 of Petitioner's Amended Bill and had been appointed guardian of their persons and property by the Honorable G. M. Robertson sitting in Probate on May fifth A. D. 1858 upon the petition of Pai, widow of said Kinimaka and mother of said minor children and that exhibits O and P of Petitioner's Amended Bill are true copies of said Petition and Appointment.

21.

That she admits that said Richard Armstrong never executed a deed of said premises to said David Kalakaua; That she admits that after the date of said alleged decree said David Kalakaua retained open notorious and undisputed possession of said land and dealt with it as his own but denies that he entered on said land on
106 December fifteenth A. D. 1858; That she alleges that David Kalakaua retained neither exclusive nor continuous possession of said land from that time until the time that he deeded away said property and denies that he dealt with said land in all ways as his own.

And defendant admits that Petitioner has attached to her Amended Bill true copies and translations of the original Land Commission Award and Royal Patent of the land involved in this case, to wit exhibits Q and R. Defendant denies that Petitioner has attached any copy of the original record of evidence given before the Land Commission and alleges that exhibit S of Petitioner's Amended Bill consists of a copy and translation of two pages of the Mahele Book showing exchange grants between the King and Kinimaka as one of the chiefs and landowners and of a true copy and translation of the claim of Kinimaka before the Board of Commissioners to Quiet Land Titles of the land involved in this case and other lands.

22.

That she admits that Kapiolani, David Kawananakoa, E. H. Wodehouse and Kapiolani Estate Limited have been in open and notorious possession of said property described in section 2 of Petitioner's Amended Bill and that said possession has been undisputed until about January first A. D. 1900 but she denies that said parties have at all times dealt with it as their own and denies that Luakini and wife at any time had possession of said land or dealt with it in any way as their own. And she alleges that the possession of

said Kapiolani was not exclusive but that the minor children of said Kinimaka also had possession of said premises.

That she denies that Kapiolani Estate Limited is a purchaser for a valuable consideration of said property and denies that it is a purchaser without notice and alleges that the public records
107 give public notice that the title to said premises is and has been in herself and her predecessors in title Moses Kapaakea Kinimaka and said Kinimaka.

That she admits that the deeds referred to in section 22 of Petitioner's Amended Bill have all been executed by the parties named in said section and recorded in the Office of the Registrar of Conveyances on the Island of Oahu as alleged in said section but denies that any of said deeds passed any title to the premises described in section 2 of Petitioner's Amended bill.

23.

That she on information and belief, denies that Moses Kapaakea, her grantor, was at any time aware that the said David Kalakaua was dealing with said premises as his own, or, until seven or eight years ago was aware that any of the persons named in section 22 of Petitioners' Amended Bill were dealing with it as their own or had ever dealt with it as their own. That she admits that said Kinimaka devised his legal title in said premises to said Kaniu, David Leleo and Moses Kapaakea.

24.

That she admits the allegations of section 24 of Petitioner's Amended Bill as to the date of majority of Kaniu Kinimaka, David Leleo Kinimaka but denies that they never asserted any claim to the said lands; that she admits that they acquiesced in the possession of the said David Kalakaua and Kapiolani but denies that they admitted any claim of right in said David Kalakaua and Kapiolani and alleges that their relations with said David Kalakaua and Kapiolani were continuously friendly and that no one objected to the occupation of the premises by any of the others; that said David Kalakaua and said Kapiolani never brought home to the actual knowledge of Kaniu Kinimaka, David Leleo Kinimaka, or Moses Kapaakea Kinimaka any adverse and hostile claim to the land described in section 2 of petitioner's Amended Bill. That she
108 admits that Moses Kapaakea Kinimaka through whom she derives title acquiesced in the possession of David Kawananakoa, Jonah Kalanianaole and Kapiolani Estate Limited but denies that he knew or acquiesced in their claim of title. That said Moses Kapaakea was possessed of an estate in remainder in said land; That the intervening life estate came to an end by the death of said Kaniu Kinimaka January fourth A. D. 1901; That thereafter this defendant, grantee of said Moses Kapaakea Kinimaka, learning that the parties occupying said premises, to wit, Panailike, Kimo Keliimoene, Kauka Hale, Mrs. Kaluahine Haina, Punahoa, Mahoe, Hugo K. Kawelo, Kaaipuaa, and Lewers and Cooke Limited

refused to give up possession to her and claimed a right to possession under leases from said Kapiolani and from Kapiolani Estate Limited, did not sleep on her rights but promptly on the twenty-ninth day of July A. D. 1901 brought an action of ejectment against said Panailike, Kimo Keliimoeone, Kauka Hale, Mrs. Kaluahine Haina, Punahoa, Mahoe, Hugo K. Kawelo, Kaaipuaa, and Lewers and Cooke Limited and said Kapiolani Estate Limited.

25.

That she admits that by the will of the said Kinimaka aforesaid all of his property was devised to his said daughter Kaniu for her lifetime, and then to his son David Leleo Kinimaka for his lifetime and the remainder to his son Moses Kapaakea Kinimaka; that the said Moses Kapaakea Kinimaka sold his estate in remainder to defendant May eighteenth A. D. 1897 by deed recorded in the office of the Registrar of Conveyances in Honolulu in Book 167 at page 368; that said David Leleo Kinimaka died before Kaniu Kinimaka; that on January fourth A. D. 1901 said Kaniu Kinimaka died and a fee simple estate was vested in her.

26.

That she admits that by claim of title from said David Kalakaua the petitioner has today any title and interest formerly held
109 by the said David Kalakaua in and to the said lands and that the series of deeds forming said chain of title are all recorded in the Office of the Registrar of Conveyances in Honolulu.

27.

That she admits that said Richard Armstrong failed to convey of record the interest of David Leleo and Kaniu and Moses Kapaakea children of Kinimaka, deceased and that Petitioner does not have a complete chain of title from Kinimaka, deceased.

28.

That she denies that by the said action in ejectment she is seeking to take any unconscionable advantage of petitioner; that she is harassing petitioner with litigation, or clouding any title of petitioner or shutting it out of any due and full enjoyment of any title. That she admits that the legal title to the land involved in this suit is in her and denies that any equitable title is in petitioner.

That she alleges that the said David Kalakaua during all his life which lasted until January Twentieth, A. D. 1891, well knew that said Richard Armstrong had never conveyed said premises to him; That he never took action to have any right to a conveyance enforced against Moses Kapaakea Kinimaka; that petitioner and all its grantees back to David Kalakaua were charged with notice from the public records and from the muniments of title in their own possession that said Richard Armstrong had never conveyed said premises to David Kalakaua; that this action is now brought forty-

three years or more than four times the term of the statute of limitations since the alleged date of the alleged decree ordering Richard Armstrong to give a conveyance and that the claim of the Kapiolani Estate Limited, petitioner herein, is stale and should not now be enforced.

That she alleges and claims that for this court now, by injunction to force her to given a conveyance of said premises
110 to Kapiolani Estate Limited, the petitioner herein, without any opportunity having ever been given her to be heard on the matters set forth in the said petition of David Kalakaua of July nineteenth A. D. 1858 and to defend, protect and enforce her rights, and without any opportunity having ever been given said Moses Kapaakea Kinimaka, her grandpa, to be heard on the matters set forth in the said petition of David Kalakaua of July nineteenth A. D. 1858 and to defend, protect, and enforce his rights, would deprive her of said property without due process of law and would be contrary to the provisions of Article V. and Article XIV, Section 1, of Amendments to the United States Constitution.

29.

That she denies that it would be equitable to allow her to prosecute her action of ejectment.

30.

That she admits that she is a married woman but is ignorant how said fact can in any way prevent petitioner from having a plain, complete and adequate remedy at law and leaves petitioner to its proof thereof.

That she is ignorant whether or not petitioner has a plain, complete and adequate remedy at law to the action of ejectment brought by this defendant, but alleges that Petitioner has not confessed judgment in said action nor suffered default, but has filed an answer denying the truth of the facts stated by her in her complaint as Plaintiff in said action; that if said facts are not true the Petitioner has a sufficient remedy in the said suit at law and she claims that before this Court should enjoin said action at law Petitioner should withdraw its Answer therein and confess judgment or suffer default.

That she denies that to issue a restraining order would avoid
111 a multiplicity of suits and prays that each and every prayer of Petitioner be denied and that she be dismissed with her costs in this behalf most wrongfully sustained.

(Signed) MARY H. ATCHERLEY.

TERRITORY OF HAWAII,
Island of Hawaii, District of Waimea, ss:

Mary H. Atcherley, being first duly sworn, on oath states that she knows the contents of the foregoing Answer by her subscribed and that the same is true save as to the matters therein

stated upon information and belief and that she believes those matters to be true.

(Signed) MARY H. ATCHERLEY.

Subscribed and sworn to before me this 27 day of November A. D. 1903.

(Signed) JAMES BRIGHT,
[SEAL.] *Notary Public.*

112 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Equity.

KAPIOLANI ESTATE, LIMITED, a Corporation,
vs.
MARY H. ATCHERLEY.

Plaintiff's Replication.

The said Kapiolani Estate, Limited, plaintiff herein, saving and reserving unto itself all and every manner of advantage of exception to the manifold insufficiencies of the defendant's answer, for replication thereto, saith:

That it will aver and prove its said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this plaintiff; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this plaintiff is and will be ready to aver and prove as this Honorable Court shall direct and humbly prays as in and by its said bill it hath already prayed.

(Signed) KAPIOLANI ESTATE, LIMITED,
By its Attorneys, KINNEY, McCLANAHAN & COOPER.

Dated Honolulu, December 18, 1903.

Indorsed: 18/410. Equity No. 1246. At Chambers. In Equity. First Judicial Circuit, Territory of Hawaii, Kapiolani Estate, Limited, a Corporation, Plaintiff, vs. Mary H. Atcherley, Defendant. Plaintiff's Replication. Judge. Filed December 19, 1903. J. A. Thompson, Clerk. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for —.

113 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

KAPIOLANI ESTATE, LIMITED, Plaintiff,
vs.
MARY H. ATCHERLEY, Defendant.

Bill for Injunction.

Order Reinstating Temporary Injunction.

The amended motion of the Kapiolani Estate Limited, the above named plaintiff, for the reinstatement of the temporary injunction hereinbefore issued on February 1, 1902, having come before this Court for hearing this 27th day of August, 1909, and both the plaintiff and defendant being represented and presenting argument by their respective attorneys, and it seeming to this Court that the said motion should be granted and the said temporary injunction reinstated.

Now therefore, it is ordered that said temporary injunction issued herein on February 1, 1902, be and the same hereby is reinstated, in full force and effect.

Dated, Honolulu, September 4th, as of August 27, 1909.

(Signed) W. J. ROBINSON,
Third Judge, First Circuit Court.

O. K. LYLE E. DICKEY.

Endorsed: E. No. 1246 Reg. Pg. Circuit Court, First Circuit, Territory of Hawaii. At Chambers. In Equity. Kapiolani Estate, Limited, Plaintiff, vs. Mary H. Atcherley, Defendant. Before W. J. Robinson, 3rd Judge. Order Reinstating Temporary Injunction. Filed Sept. 4, 1909, at 9:15 A. M. (Signed) M. T. Simonton, Clerk. Kinney, Ballou, Prosser & Anderson, 303 Stangenwald Building, Honolulu, Attorneys for Plaintiff.

114 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Equity.

Eq. No. 1246.

KAPIOLANI ESTATE, LIMITED,
vs.
MARY H. ATCHERLEY.

Bill for Injunction.

Supplemental Answer.

Now comes the defendant, Mary H. Atcherley, by leave of court first had and obtained and makes this, her supplemental answer to the amended bill of complaint of the petitioner and says:

1.

That since the filing of defendant's answer, the petitioner Kapiolani Estate Limited has parted with all its estate in the land involved in this case.

That August 30th 1902 it conveyed a small portion of said land containing an area of 3525 square feet to David Kawananakoa and Jonah Kalanianaole by deed recorded in the Office of the Registrar of Conveyances in Honolulu in Book 241 at page 447, a true copy of which deed is hereto attached as Exhibit A, and made a part hereof.

That May 29th 1905 it conveyed all its remaining interest in said premises to Lewers and Cooke Limited, a Hawaiian corporation by two instruments, true copies of which are hereto attached as exhibits B and C and made a part hereof.

2.

That said Lewers and Cooke Limited January 29th 1906 brought suit in the Court of Land Registration to register its title to said land. That a decree was entered in said court September
115 16th 1907 that Lewers and Cooke Limited had a good title entitled to registration. That on appeal by Mary H. Atcherley said decree was set aside by the Supreme Court of the Territory of Hawaii and decision filed March 5 1908 holding that Lewers and Cooke Limited had no title, legal or equitable in said land, which decision is printed in Vol. 18 Haw. Repts. pp. 625-640 and is here referred to and made a part hereof. That Lewers and Cooke Limited filed a motion for rehearing and on consideration thereof the Supreme Court of Hawaii rendered a decision May 4 1908 contained in Vol. 19 Haw. Repts. pp. 47-51 which is here referred to and made a part hereof. That the Supreme Court of Hawaii remitted the said case to the Court of Land Registration for further proceedings. That said Court entered a decree dismissing the petition of Lewers and Cooke Limited for registration. That Lewers and Cooke Limited appealed to the Supreme Court of Hawaii upon points of law. That the Supreme Court of Hawaii modified the decree of the Court of Land Registration and March 24 1909 entered a final decree that Lewers and Cooke Limited had no title, legal or equitable to said land, a true copy of which decree is here attached as exhibit D. and made a part hereof. That Lewers and Cooke Limited appealed from said decree to the Supreme Court of the United States and filed 28 assignments of errors, a true copy of which assignments of errors is hereto attached as exhibit E. and made a part thereof. That the Supreme Court of the United States December 18th 1911 rendered a decision affirming said decree which decision is hereby referred to and made a part hereof; that a mandate from the Supreme Court of the United States to the Supreme Court of Hawaii has been sent down, a true copy of which mandate is hereto attached as exhibit F. and made a part hereof. That said decree of the Supreme Court of Hawaii is in full force and effect.

That said proceedings in the Court of Land Registration, Supreme

Court of Hawaii and Supreme Court of the United States
116 were upon the merits of the case and the cause of action so finally adjudicated was the same right and cause of action as that on which the complainant in this case has founded its bill.

3.

That the petitioner, Kapiolani Estate Limited had notice of said proceedings in the Court of Land Registration, Supreme Court of Hawaii and Supreme Court of the United States; that since May 22d 1909 Messrs. Castle and Withington who have been attorneys for Lewers and Cooke Limited throughout said litigation have been attorneys of petitioner in this case.

And this defendant claims that all points raised by the Amended Bill of Complaint of petitioner in this case have been considered and finally decided in said proceedings; that said proceedings are res adjudicata; that Kapiolani Estate Limited is estopped by its laches and deeds from now relitigating what has been finally decided as to its grantee's title; and that said decisions are binding on this court.

And defendant prays that the temporary injunction now in force in this case be set aside and the petition of Kapiolani Estate Limited be dismissed at Petitioner's costs.

(Signed) MARY H. ATCHERLEY.

LYLE A. DICKEY,
Attorney for Mary H. Atcherley.

TERRITORY OF HAWAII,
City and County of Honolulu, ss:

Mary H. Atcherley, being first duly sworn, on oath states that she knows the contents of the foregoing supplementary answer by her subscribed and that the facts therein stated are true.

(Signed) MARY H. ATCHERLEY.

Subscribed and sworn to before me this 20th day of February, 1912.

(Signed) C. H. DICKEY,
[SEAL.] *Notary Public.*

117 EXHIBIT A.

This indenture made this 30th day of August, A. D. 1902 by and between the Kapiolani Estate, Limited, a corporation duly created and existing under and by virtue of the laws of the Territory of Hawaii, and having its principal place of business in Honolulu, Island of Oahu, Territory of Hawaii, aforesaid, of the first part, hereinafter called the Grantor, and David Kawananakoa and Jonah Kalanianaole, of said Honolulu, of the second part, hereinafter called the grantees,

Witnesseth: That the said Grantor, for and in consideration of the sum of Five Thousand Three Hundred and Six Dollars

($5,306.00) to it in hand paid by the said Grantees, the receipt whereof is hereby acknoweldged, does hereby give, grant, bargain, sell and convey unto the said Grantees all of the following pieces and parcels of land, to wit: First, all of that portion of Royal Patent No. 4631, L. C. A. 10677, Apana 2 to Pupuka, situate at Hamohamo, Waikiki, in said Honolulu, bounded and described as follows:

Beginning at the north corner of a road leading to the Roman Catholic Church and Waikiki Road, 37.0 feet from a mark a little from the end of breakwater, and running as follows by true bearings:

N. 34° 64′ E. 45.0 feet along road;

N. 25° 45′ W., 108.0 feet along new mauka line of Waikiki Road;

S. 53° 42′ W. 46.2 feet;

S. 26° 48′ E. 107.5 feet along old mauka line of Waikiki Road to the initial point, and containing an area of 4787 square feet;

Second. All that portion of Royal Patent No. 1602, L. C. A. 129 Apana 1 to Kinimaka, situate on Punchbowl Street at Honuakaha, said Honolulu, bounded and described as follows:

Beginning at the West corner of this land on the South side of Punchbowl Street line and 370.0 feet from the old South corner of Queen and Punchbowl Streets, and running as follows by
118 true bearings:

N. 70° 08′ E., 370.0 feet along old street line;

S. 33° 20′ E., 12.0 feet to new street line;

S. 77° 52′ W., 372.5 feet along new street line;

N. 42° 05′ W., 7.0 feet to the initial point, and containing an area of 3525 Square Feet.

Third. All those portions of Grant 2349 to Napunako, L. C. A. 5049 B. R. P. 1918 to Keoki no Malule, L. C. A. 236 R. R. P. 504 to Kaholo L. C. A. 6059, R. P. 503 to Papamakua; situate at Olomana, Pauoa, in said Honolulu, bounded and described as follows:

Beginning at a point on the north line of the proposed Fort Street extension, on the boundary of Grant 2349 and L. C. A. 998 to Paia 187.5 feet from the North corner of the proposed extension of Fort and Kuakini Streets and running as follows by true bearings:

N. 46° 21′ E. 477.0 feet along proposed Fort Street extension;

S. 21° 04′ E., 54.5 feet along L. C. A. 38 F. L. to Kekumupala;

S. 46° 21′ W. 472.3 feet along proposed Fort Street extension;

N. 35° 35′ W., 9.0 feet along L. C. A. 998 to Paia;

N. 33° 00′ W. 44.0 feet along L. C. A. 998 to Paia;

N. 23° W. 44.0 feet along L. C. A. 998 to Paia to the initial point and containing an area of 23,320 Square Feet;

Fourth. All that portion of Royal Patent No. 2250 L. C. A. 855 to Kamahalo situate at Olomana, Pauoa, in said Honolulu, bounded and described as follows:

Beginning at a point on the North line of the proposed Fort Street extension 311.5 feet from the north corner of the proposed Fort and Kuakini Street extensions and running by true bearings:

N. 46° 21′ E. 177.5 feet along proposed street extension;

S. 16° 25′ E., 57.0 feet along L. C. A. 11 F. L. to Kapule;

S. 46° 21′ W., 171.3 feet along proposed street extension;
N. 21° 54′ W., 54.0 feet along L. C. A. 38 FL. to Kekumu-
119 pala to initial point and containing an area of 12,550 Square Feet;

Fifth. An undivided one-half interest in that portion of L. C. A. 38 F. L., R. P. 1911 to Kekumupala, situate in Olomana in Pauoa, in said Honolulu, bounded and described as follows:

Beginning at the West corner of this Award on the North line of the proposed Fort Street extension, 664.5 feet from the North corner of the proposed new Fort and Kuakini Street extensions and running as follows by true bearings:

N. 46° 21′ E., 77.0 feet along proposed street extension;
S. 21° 54′ E., 54.0 feet along L. C. A. 855 to Kamahalo;
S. 46° 21′ W., 78.0 feet along proposed street extension;
N. 21° 04′ W., 54.5 feet along L. C. A. 6059 to Papamakua to the initial point, and containing an area of 3875 Square Feet;

All and singular the above pieces and parcels of land being portions of certain of the lands conveyed to said Grantor by deed of D. Kawananakoa and J. Kalanianaole dated August 7th A. D. 1899 and duly recorded in Liber 194, page 427 et seq.

To have and to hold all and singular the said above granted and described pieces and parcels of land with the appurtenances unto the said David Kawananakoa and Jonah Kalanianaole, and their heirs and assigns forever.

And the said Grantor for itself and its successors hereby covenants with the said Grantees and their respective heirs and assigns that it is lawfully seized in fee simple of the granted premises; that the same are free and clear of all incumbrances; that it has good right to sell and convey the same as aforesaid and that it will and its successors shall Warrant and Defend the same unto the said Grantees and their respective heirs and assigns forever against the lawful claims and demands of all persons.

In Witness Whereof the said Grantor by its officers hereto
120 duly authorized has set its hand and corporate seal the day and year first above written.

KAPIOLANI ESTATE, LIMITED,
By its Vice-President, J. KALANIANAOLE.
C. A. L.,
By Its Treasurer, JOHN F. COLBURN.

The word "Vice" interlined between the words "its" and President was made before signing.

C. A. LONG.

TERRITORY OF HAWAII,
Island of Oahu, ss.

On this 2nd day of September A. D. 1902 personally appeared before me, J. Kalanianaole and John F. Colburn, respectively Vice president and Treasurer of the Kapiolani Estate Limited, known to me to be the persons described in and who executed the foregoing instrument and who acknowledged to me that they executed the

same freely and voluntarily as and for the free act and deed of said Kapiolani Estate Limited for the uses and purposes therein set forth.

CARLOS A. LONG,
Notary Public, First Judicial Circuit.

121 EXHIBIT B.

This Indenture, made this 29th day of May, 1905, between the Kapiolani Estate Limited, a Hawaiian corporation, having its principal office and place of business in Honolulu, Island of Oahu, Territory of Hawaii, of the first part, Grantor, and Lewers & Cooke, Limited, a like Hawaiian corporation, having its principal office and place of business in Honolulu, of the second part, Grantee, Witnesseth:

That the said Grantor in consideration of Thirty-Five Thousand (35,000) Dollars to it paid by the said Grantee, the receipt whereof is acknowledged, doth hereby grant, bargain, sell and convey to it the said Grantee, all of that certain parcel of land situate on the south corner of Queen and Punchbowl Streets in said Honolulu, more particularly described as follows, to-wit:

Beginning at new south angle of Queen and Punchbowl Streets, this point being South (true) 357.14 feet and East (true) 110.45 ft. from the "Magnetic" Station near Government Kapuaiwa Building, the boundary runs by true azimuths:

321° 32′, 94.45 ft. along makai side of Queen Street;

56° 46′, 158.40 ft. along boundary of L. C. A. 729 to Kekuhaupio;

323° 10′, 151.50 ft. across L. C. A. 729 to angle of fence adjoining L. C. A. 735 Kaahumanu;

53° 57′, 162.37 ft. along fence and L. C. A. 735;

51° 18′, 104.70 ft. along fence and L. C. A. 735 and L. C. A. 677 (Kekuanaoa);

140° 25′ 143.30 ft. along land of Auwaiolimu;

235° 01′ 39.29 ft. along portion of L. C. A. 129;

160° 9½′ 255 ft. along portion of L. C. A. 129 to new line of Punchbowl Street;

257° 58′ 354.6 ft. along portion of L. C. A. 129 to new line of Punchbowl Street;

257° 58′ 354.6 ft. along new line of Punchbowl Street to the Initial Point;

122 Containing an area of 100,843 square feet or 2.315 acres and being portions of the premises set forth under R. P. 1602 upon L. C. A. 129 to Kinimaka and R. P. 1730 on L. C. A. 729 to Kekuhaupio.

To have and to hold the above mentioned and described premises with the rights, easements, privileges and appurtenances to the same belonging, to the said Grantee its successors and assigns forever.

And the said Grantor, for itself, its successors and assigns, doth covenant and agree with the said Grantee, its successors and assigns, that it, the said Grantor is seized in fee of the said above mentioned

and described premises and that it has good right to sell and convey the same; that the said premises are free and clear of all incumbrances; that it will at the request of the Grantee at any time hereafter make, execute and deliver such deeds of covenants for further assurance as shall or may be necessary, and that it or its said successors or assigns shall and will at all times warrant and defend the same against the lawful claims and demands of all persons whomsoever to the said Grantee, its successors or assigns.

In witness whereof the said Grantor has caused its corporate seal to be hereunto attached and its name to be signed by its President and Treasurer thereunto by resolution duly authorized, the day and year first aforesaid.

KAPIOLANI ESTATE, LIMITED,
By Its President, D. KAWANANAKOA;
By Its Treasurer, JOHN F. COLBURN.

TERRITORY OF HAWAII,
Island of Oahu, Honolulu, ss:

On this 29th day of May, 1905, personally came and appeared before me David Kawananakoa and John F. Colburn, to me known and known to me to be the President and Treasurer respectively of the Kapiolani Estate, Limited a Hawaiian Corporation, de-
123 scribed in and which executed the foregoing instrument, and they severally acknowledged that they executed the same freely and voluntarily as and for the act of said corporation by virtue of a resolution authorizing them to do so, and for the uses and purposes therein set forth.

W. S. EDINGS,
Notary Public, First Circuit, Territory of Hawaii.

124 EXHIBIT C.

This indenture, made this 29th day of May, 1905, between Carlos A. Long, of Honolulu, Island of Oahu, Territory of Hawaii, as Trustee for David Kawananakoa and Jonah Kalanianaole, of the first part, Grantor, the Kapiolani Estate, Limited, a Hawaiian Corporation having its principal office in said Honolulu, of the second part, Warrantor, and Lewers and Cooke, Limited, a like Hawaiian Corporation having its principal office in said Honolulu, of the third part, Grantee,

Witnesseth That the said Grantor, in consideration of Eight Thousand Five Hundred (8,500) Dollars to him paid by the said Grantee, the receipt whereof is acknowledged, doth hereby grant, bargain, sell and convey to the said Grantee all of that certain piece or parcel of land situate on the Southerly side of Punchbowl Street in said Honolulu, and more particularly described as follows: that is to say:

Beginning at a point on new south line of Punchbowl Street 354.6 feet from new South angle of Punchbowl and Queen Streets and running by true azimuths:

1. 77° 58′ 151.2 ft. along new south line of Punchbowl Street,
2. 317° 34½′ 307.6 ft. along land of Auwaiolimu,
3. 235° 01′ 32.9 ft. along L. C. A. 729 to Kekuhaupio,
4. 160° 09½′ 255 ft. along portion of L. C. A. 129 leased to Lewers & Cooke to initial point.

Containing an area of 24,169 square feet or .56 acre and being a portion of the premises covered by R. P. 1802 on L. C. A. 129 to Kinimaka.

To have and to hold the said above mentioned and described premises with the rights, easements, privileges and appurtenances to the same belonging to the said Grantee, its successors and assigns forever. And the said Grantor for himself as trustee and for his successors in trust and the said Kapiolani Estate Limited, Warrantor, in consideration of One Dollar to it paid by the Grantee, and for other good and sufficient considerations to it moving, do
125 hereby promise, covenant and agree with the said Grantee, its successors and assigns, that said Grantor is seized in fee of the said above mentioned and described premises, (the said Warrantor having a beneficial interest therein), that said Grantor has good right to sell and convey the premises, that the same are free and clear of all incumbrances, and that it, the said Warrantor, shall and will at all times warrant and defend the same to the said Grantee, its successors and assigns against the lawful claims and demands of all persons whomsoever, claiming or to claim the same or any part thereof.

In Witness Whereof the said Carlos A. Long, Trustee, has hereto set his hand and the Kapiolani Estate Limited has caused its corporate seal to be hereunto attached and its name to be signed by David Kawananakoa, its president, and John F. Colburn, its treasurer, the day and year first aforesaid.

CARLOS A. LONG,
Trustee for D. Kawananakoa & J. Kalanianaole.

[SEAL.] KAPIOLANI ESTATE, LIMITED,
By D. KAWANANAKOA, *President;*
By JOHN F. COLBURN, *Treasurer.*

ISLAND OF OAHU,
Territory of Hawaii, ss:

On this 29th day of May, 1905, personally appeared before me Carlos A. Long, Trustee for D. Kawananakoa and J. Kalanianole and also D. Kawananakoa, President and John F. Colburn, Treasurer of the Kapiolani Estate, Limited known to me to be the persons described in and who executed the foregoing instrument, and the said Carlos A. Long acknowledged to me that he executed the same freely and voluntarily and as Trustee for D. Kawananakoa and J. Kalanianaole for the uses and purposes therein set forth. And the said D. Kawananakoa and John F. Colburn acknowledged to me that they executed the same freely and voluntarily and as the free act and deed of the Kapiolani Estate Limited for the uses and purposes therein set forth.

W. S. EDINGS,
Notary Public, First Circuit, Territory of Hawaii.

126 EXHIBIT D.

In the Supreme Court of the Territory of Hawaii, October Term, 1908.

In re Application of LEWERS AND COOKE, LIMITED, for the Registration of Title to Land.

Decree.

This case coming on to be heard upon appeal by Lewers and Cooke, Limited, from a decree rendered May 22, 1908, by P .L. Weaver, Judge of the Court of Land Registration of the Territory of Hawaii, and it appearing that said decree was erroneous in containing a recital that this court had ordered that a final decree be entered by the Court of Land Registration denying the petition to register that portion of the lands described in the answer of Mary H. Atcherley and in denying the entire petition:

It is hereby ordered, adjudged and decreed that the said decree of the Court of Land Registration be and it hereby is modified so as to read as follows:

The court finding that the petitioner, Lewers and Cooke, Limited, has no legal or equitable title to the land described as Lot 1 of Land Commission Award 129 Royal Patent 1602, Issued to Kinimaka, its petition for registration is denied without prejudice to its right to obtain a registered title to all that land not covered by said Lot 1 of Land Commission Award 129, Royal Patent 1602.

Honolulu, March 24, 1909.

J. A. THOMPSON, *Clerk.*

127 EXHIBIT E.

In the Supreme Court of the United States.

LEWERS AND COOKE, LIMITED, Appellant,
vs.
MARY H. ATCHERLEY, Appellee.

Appeal from the Supreme Court of the Territory of Hawaii.

Assignment of Errors.

Now comes Lewers and Cooke, Limited, appellant in the above entitled action, and says that in the record of the proceedings in said action in the Supreme Court of the Territory of Hawaii there is manifest error in this, to wit:

1. That the said Supreme Court of the Territory of Hawaii erred in overruling appellant's appeal from the decision and decree of the Court of Land Registration of the Territory of Hawaii denying its application for the registration of a title to the land in con-

troversy in said cause, and in modifying and affirming said decree as modified.

2. That the said court erred in its decision filed March 5, 1908, sustaining the appeal of the said Mary H. Atcherly from the decree of the Court of Land Registration registering the title of Lewers and Cooke, Limited, to the premises in controversy, and in reversing said decree and remanding the case for further proceedings in conformity with its opinion.

3. That the said court erred in denying the petition of the said Lewers and Cooke, Limited, for a rehearing of the decision set out in the last assignment of error, and in overlooking, in the denial of said petition, controlling decisions and questions decisive of the cause.

4. That there is error in holding that the decision rendered in the cause on September 15, 1907, by the Court of Land Registration, and the evidence upon which it was based, do not show that Lewers and Cooke, Limited, for a rehearing of the decision set out in Apana 1, L. C. A. 129, R. P. 1602 to Kinimaka, and are entitled to register their title thereto.

5. That there is error in holding that said decision of the Court of Land Registration rendered September 16, 1907, and the evidence upon which it was based, do not show that Lewers and Cooke, Limited, have, if not a legal title, an equitable title to the premises Apana 1, L. C. A. 129, R. P. 1602 to Kinimaka, and are entitled to register their tjtle thereto.

6. That there is error in holding that said decision of the Court of Land Registration rendered September 16, 1907, and the evidence upon which it was based, do not show that Lewers and Cooke, Limited, as successor in interest to Kalakaua, have a legal title in the premises described, in that it will be presumed from the decree in Equity No. 155 rendered November 2, 1858, from the recital in the mortgage from Kalakaua to Armstrong and the release of that mortgage, and from the continued possession of the premises by Kalakaua and his successors in interest, that a conveyance was duly made of the legal title as directed by the decree.

128 7. That there is error in holding that the decree of the Hon. G. H. Robertson, Justice of the Supreme Court of the Hawaiian Islands, admitting to probate the oral will of Lilia H. Kaniu on May 3, 1858, is not a binding and conclusive adjudication upon the respondent, Mary H. Atcherly, that David Kalakaua was, after the death of Kaniu, down to and at the time of the award, beneficially entitled to the premises awarded and patented to Kinimaka and described as Apana 1, L. C. A. 129, R. P. 1602, and that Kinimaka held the same as his trustee and guardian.

8. That there is error in holding that the decree of the Supreme Court of the Hawaiian Islands made by the Hon. E. H. Allen, Chief Justice thereof, on November 2, 1858, in Equity No. 155,, is not a conclusive adjudication between the parties that Kinimaka took the award and patent in question in trust, and that Kalakaua and his successors in interest, including these petitioners, were and are the equitable owners of the premises as against Moses Kapaakea Kini-

maka and his successor in interest, the respondent Mary H. Atcherly, entitled to a conveyance of the legal title; that said decree is a complete and final decree, not subject to be reviewed or re-opened at this time and in this proceeding.

9. That there is error in holding that the decree of the Supreme Court of the Hawaiian Islands, in Equity No. 158, referred to, if not adversary in its character and entered by consent, was not entered upon a valid consideration, viz., the abandonment of the claims of Kalakaua to other lands claimed by the respondents in that action, and, that such a compromise, having been acted on and assented to for more than forty years, can be disturbed at this date and is not binding and conclusive upon the respondent, Mary H. Atcherly.

10. That there is error in holding that the decision of the Supreme Court of the Territory of Hawaii rendered in Equity Case No. 1246, Kapiolani Estate, Limited, v. Mary H. Atcherly, on April 7, 1903, is not an adjudication binding on said Mary H. Atcherly and conclusively determining as to her that the decision and decree in Equity No. 155 rendered on November 2, 1858, by the said Hon. E. H. Allen, Chief Justice of the Supreme Court of the Hawaiian Islands, is not binding and conclusive upon the parties to said action and is not a complete decree and can be reopened or reviewed after more than forty years have elapsed since its rendition, and is not conclusive in this proceeding as against Mary H. Atcherly of any rights other than the bare legal title, in the premises.

11. That there is error in holding that the said decrees of the Hon. G. H. Robertson and the Hon. E. H. Allen, and said decision of the Supreme Court in the case of the Kapiolani Estate, Limited, v. Atcherly, are not and each of them is not a rule of property laid down by the highest court of the jurisdiction in reference to the identical property in litigation here, and that under the facts found by the decision in this cause the rule of property therein laid down should not be followed and the title of the petitioners registered to the premises in dispute.

12. That there is error in holding that the decision referred to in the last assignment of error need not be followed by the Supreme Court of Hawaii on the principle of stare decisis.

13. That there is error in denying the contention of appellant that the decision by the Supreme Court in the case of Kapiolani Estate, Limited, v. Atcherly, having been rendered on a stipulation and for the purpose of determining between the parties whether the decision in Kalakaua v. Armstrong rendered in 1858 was res judicata between the parties, and the parties having consented to the matter being determined in the present litigation, that case still pending, the opinion is the law of this case, should have been followed and the title of this petitioner registered.

129 14. That there is error in holding that the opinion and decision of the Supreme Court in Kapiolani Estate, Limited, v. Atcherly should not be controlled, limited or construed by any reference to the stipulation of parties referred to, in which stipula-

tion they agreed that the question of res judicata under the proceedings in the cases of Estate of Kaniu and Kalakaua v. Pai and Armstrong should be in said appeal "first adjudicated and settled" thereby determining whether further litigation between the parties hereto is necessary or not.

15. That there is error in denying the contention of appellant that Lewers and Cooke, Limited, having bought on the faith of the decisions herein set forth, which were and had become part of the law of the land, and particularly the law of this land, were entitled to rely on said decisions and a decree should have been entered in accordance with the decision rendered by this court registering their title.

16. That there is error in holding that it is not a violation of the Constitution of the United States, it is not a taking of property without due process of law or the impairment of the obligation of a contract to hold that Lewers and Cooke, Limited, who bought their title relying on the faith of the decision by the Supreme Court of Hawaii rendered in the case of the Kapiolani Estate Limited, v. Atcherly that the decree of Judge Allen rendered November 2, 1858, was a complete and binding adjudication on the respondent, Mary H. Atcherly, susceptible of being enforced, are not entitled to enforce said decree and register their title in this proceeding.

17. That there is error in holding that the courts of equity of the Hawaiian Islands had not in 1858, and have not had at all times, jurisdiction and authority to declare the awardee under a land commission award trustee for the one equitably entitled to the land so awarded under equities existing at the time of the award.

18. That there is error in holding that under the decision and evidence in this case David Kalakaua was, and his successors are, not equitably entitled to the premises in contest here, and that the holder of the legal title under the Land Commission award does not hold the same as the trustee for him and his successors in interest, who were equitably entitled at all times to demand a conveyance of said title.

19. That there is error in holding that Moses Kapaakea and Kinimaka and his successor in interest, Mary H. Atcherly, have not been guilty of laches and are not now estopped to review or set aside the decision made in Equity No. 155 on November 2, 1858.

20. That there is error in holding that the petitioner had no right to rely on the decision in the Kapiolani Estate, Limited, v. Atcherly, 14 Haw. 651, because there was no decree and because the decision was on demurrer, which would be by no means conclusive as predicating the final determination, since the facts in this case are conceded to be the same as those presented in the bill demurred to; and that there is error in further holding that the petitioner was only entitled to rely upon the general principles of law announced.

Dated, Honolulu, March 24, A. D. 1909.

CASTLE & WITHINGTON,
KINNEY, MARX, PROSSER & ANDERSON,

Attorneys for Appellant.

130 EXHIBIT F.

United States of America, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the Territory of Hawaii, Greeting:

Whereas, lately in the Supreme Court of the Territory of Hawaii before you or some of you, in a cause entitled In the matter of the petition of Lewers & Cooke, Limited, a corporation, for a registered title to land, on appeal from the Court of Land Registration, wherein the decree of the said Supreme Court, entered in said cause on the 24th day of March, A. D. 1909, is in the following words, viz:

"This case coming on to be heard upon appeal by Lewers and Cooke, Limited, from a decree rendered May 22, 1908, by P. L. Weaver, Judge of the Court of Land Registration of the Territory of Hawaii, and it appearing that said decree was erroneous in containing a recital that this court had ordered that a final decree be entered by the Court of Land Registration denying the petition to register that portion of the lands described in the answer of Mary H. Atcherley and in denying the entire petition:

It is hereby ordered, adjudged and decreed that the said decree of the Court of Land Registration be and it hereby is modified so as to read as follows:

The court finding that the petitioner, Lewers and Cooke, Limited, has no legal or equitable title to the land described as Lot 1 of Land Commission Award 129, Royal Patent 1602, issued to Kinimaka, its petition for registration is denied without prejudice to its right to obtain a registered title to all that land not covered by said Lot 1 of Land Commission Award 129, Royal Patent 1602.

By the Court:

(Signed) J. A. THOMPSON, *Clerk.*"

as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Supreme Court of the United States by virtue of an appeal whereon Mary H. Atcherly was made the appellee agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and eleven, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

131 On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby affirmed with costs; and that the said appellee, Mary H. Atcherly, recover against the said Lewers & Cooke, Limited, for her costs herein expended and have execution therefor.

December 18, 1911.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 3d day of February in the year of our Lord one thousand nine hundred and twelve.

JAMES H. McKENNEY,
Clerk of the Supreme Court
of the United States.

Costs of Appellee Mary H. Atcherly:

Clerk .....$
Printing Record .....$
Attorney .....$

Paid by Appellant.

Endorsed: Eq. 1246. Circuit Court, First Circuit. At Chambers. In Equity. Kapiolani Estate, Limited vs. Mary H. Atcherley. Supplemental Answer. Filed Feb. 29, 1912, 3:10 P. M. L. K. Aona, Clerk. Lyle A. Dickey, 1 Campbell Block, Honolulu, Attorney for Defendant.

132 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Equity.

Equity. No. 1246.

KAPIOLANI ESTATE, LIMITED, Plaintiff,
vs.
MARY H. ATCHERLEY, Defendant.

Plaintiff's Replication to Supplemental Answer.

This Plaintiff not hereby waiving or intending to waive any benefit of exception to the many errors, irregularities and insufficiencies of the supplemental answer filed in this cause by said Defendant, respectfully submits this, its replication to said supplemental answer, that is to say:

1. It admits the conveyances set forth in said supplemental answer, as per the copies thereof annexed to said supplemental answer as exhibits, and made parts thereof. But it denies that it has conveyed or parted with all of its interest in the lands described in said conveyances, or either of them, but, on the contrary, it alleges that it retains the right and interest to defend any and all suits and actions calculated or intended to establish title in any person or persons other than its ultimate grantee, to wit, Lewers & Cooke, Ltd., in said lands, and particularly any and all suits and actions which are calculated or intended to establish title thereto in said defendant. That, as shown by the conveyances in

question, this plaintiff has executed its covenants to defend and maintain the title of said Lewers & Cooke, Ltd., in and to said lands; and is furthermore a party defendant in and to that certain action in ejectment now pending in the Circuit Court for
133 the First Circuit, wherein the defendant in this cause is party plaintiff, entitled, Mary H. Atcherley, Plaintiff, vs. Kapiolani Estate, Limited, et al., Defendants, and being numbered Law, 4997, on the files of said Circuit Court. That in and by said action of ejectment the plaintiff therein,—(Defendant in this suit) seeks to recover of and from this Plaintiff the sum of $40,000, as and for damages and mesne profits.

2. This Plaintiff admits that said Lewers & Cooke, Ltd., applied to the Court of Land Registration of the Territory of Hawaii for registration of its title to the lands described in said conveyances, and that the petition of said Lewers & Cooke, Ltd., in the premises was ultimately dismissed, and that such dismissal has been approved and affirmed by the Supreme Court of the United States. But this Plaintiff denies that it was, or is, or has been in anywise a party to the said proceedings in and before said Court of Land Registration, or in, or before the Supreme Court of the Territory of Hawaii, or of the Supreme Court of the United States, and it further denies that it is in anywise bound by the said proceedings or by any judgment or decree of any of said courts had, made or rendered therein, and it denies that said proceedings or any of them, are res adjudicata or conclusive of the claims and interests of this plaintiff in the premises. It further denies that any of said courts had the right or jurisdiction to decree, or that any of them did decree, in or concerning any of the proceedings aforesaid, that said defendant, Mary H. Atcherley, is the owner of the title to said lands, or any of them.

3. This plaintiff denies the allegation of said supplemental bill to the effect that this Plaintiff had notice of said proceedings in the Court of Land Registration, the Supreme Court of Hawaii, and (or) the Supreme Court of the United States, though it admits that certain of its officers and directors, in their capacity as individuals (but not in their capacity as such officers or directors of said Plaintiff corporation,) were aware of the pendency of said pro-
134 ceedings.

4. This Plaintiff denies that all, or any of the points raised by the amended bill of complaint of Plaintiff in this cause have been considered and fully decided in said recited proceedings, or that the same have been at all considered or decided in a manner to in anywise bind or conclude this Plaintiff or to render this Plaintiff subject to any decision, judgment or decree made or rendered by any of the courts aforesaid in the premises; and it denies that it is now estopped by its laches and (or) deeds from now litigating any point or points raised by its amended bill of complaint herein, and it denies that said recited proceedings, or any of the decisions, judgments or decrees therein rendered, are in anywise binding upon this Court in this present litigation.

5. This Plaintiff further alleges that the above recited action

in ejectment is the identical suit and action the further prosecution whereof by the defendant herein, (she being party plaintiff in said action of ejectment,) is enjoined in and by the injunction heretofore issued, and now standing and effective in this cause.

6. And Plaintiff further alleges that the Defendant herein, Mary H. Atcherley, in or about the month of July, 1909, was adjudicated a bankrupt in and by the District Court of the United States for the Territory of Hawaii, and that said adjudication has never been reversed, vacated or set aside, and that said Mary H. Atcherley has ever since said adjudication been, and now is a bankrupt; and that J. Alfred Magoon, Esq., of Honolulu, has long since been and now is Trustee in Bankruptcy of the estate of her, the said Mary H. Atcherley; and that said Mary H. Atcherley hath now, as this Plaintiff is informed, advised and believes, and upon such information, advice and belief it alleges, no interest or ownership whatsoever in any land or property which is in anywise involved in this present suit, or in the action the prosecution whereof
135 is enjoined by the injunction in this suit,—but that, on the contrary, all the title and interest of her, the said Mary H. Atcherley, in said land, if any such title or interest she at any time had or owned, has been divested, as to one-half thereof, by voluntary conveyances by her to Messrs. Lyle A. Dickey and E. M. Watson, or otherwise for their benefit, and as to the remaining half thereof by virtue of the adjudication in bankruptcy last aforesaid.

Wherefore this Plaintiff now prays the Court as in and by its amended bill of complaint herein it hath already prayed, or, in the alternative, that such decree be rendered herein, variable from the specific relief prayed in said amended bill of complaint, as may be consistent with the principles of equity, when considered in connection with the conveyances in said supplemental answer set forth, and in this replication admitted, or as may be consistent with the claims and allegations in this replication set forth.

Dated. this 11th day of March, 1912.

KAPIOLANI ESTATE, LIMITED,
(Signed) By C. W. ASHFORD, *Its Attorney.*

(Signed) CASTLE & WITHINGTON,
Of Counsel.

TERRITORY OF HAWAII,
City and County of Honolulu, ss:

C. W. Ashford, having been duly sworn, deposes and says, that he is a Director, and Vice-President of Kapiolani Estate, Ltd., the Plaintiff named in the foregoing replication. That he has read said replication, and knows its contents, and that the matters therein alleged are true of his own knowledge, except as to those matters which are therein alleged upon information, advice or belief, and as to those matters, he believes them to be true; and that the denials made in and by said replication are made truly and in good faith.

(Signed) C. W. ASHFORD.

Sworn to and subscribed before me this 11th day of March, 1912.
[SEAL.] CARLOS A. LONG,
Notary Public, First Judicial Circuit.

Endorsed: #1246. In the Circuit Court of the First Circuit. Territory of Hawaii. At Chambers. In Equity. Kapiolani Estate, Limited, plaintiff vs. Mary H. Atcherley, defendant. Plaintiff's Replication to Supplemental Answer. Filed Mar. 11, 1912, 4:15 P. M. J. A. Dominis, Clerk. C. W. Ashford for plaintiff.

136 In the Circuit Court for the First Circuit, Territory of Hawaii, at Chambers. In Equity.

Equity. No. 1246.

KAPIOLANI ESTATE, LIMITED, Plaintiff,
vs.
MARY H. ATCHERLEY, Defendant.

Amendments to Plaintiff's Amended Bill of Complaint.

The said plaintiff, by leave of Court first had and obtained, hereby amends those paragraphs of its Amended Bill of Complaint in this cause which are hereinafter specified, so that they will respectively read as follows, that is to say;—

25. That by the will of the said Kinimaka aforesaid certain of his property was devised to his said daughter, Kaniu, for her lifetime, and then to his son, David Leleo Kinimaka, for his lifetime, and the remainder to his son, Moses Kapaakea Kinimaka; that on or about May 18, 1897, said Moses Kapaakea Kinimaka, (his wife Kamano, joining therein by way of relinquishment of her dower interest) executed to said defendant a certain deed, whereof the following is a literal copy, but to the original, or to a certified or recorded copy whereof, plaintiff begs leave, upon a hearing herein, for greater certainty and particularity to refer,—that is to say;—

"Know all men by these presents that M. K. Kinimaka of Honokaa Hamakua, Island of Hawaii in consideration of Fifty Dollars to him paid by Mrs. Mary H. Atcherley of Kailua, North Kona Island of Hawaii, the receipt whereof is hereby acknowledged does hereby give, grant, bargain, sell and convey unto the said Mary H. Atcherley her heirs and assigns all of his right, title and interest both real and personal of whatsoever kind nature and description as one of the heirs at law in and to the estate of his father Kinimaka deceased. To have and to hold the same
137 with all the rights privileges and appurtenances thereunto belonging unto the said Mary H. Atcherley her heirs executors administrators and assigns forever. And Kamano his wife in consideration of One Dollar does hereby release and relinquish all rights of dower in and to the aforesaid inheritance. In witness

whereof the said M. K. Kinimaka and Kamano his wife have hereunto set their hands and seals this 18th day of May 1897—

(Sign.) MOS. KAPAAKEA KINIMAKA.
" KAMANO.

In Presence of
CHARLES WILLIAMS.

And that said last mentioned deed was on or about the 3rd day of June, 1897, recorded in the Hawaiian Registry of Deeds, in Liber 167 at pages 368-369; that the said David Leleo Kinimaka died before Kaniu Kinimaka; that on January 4th, 1901, said Kaniu Kinamaka died, and the defendant herein claims that, by reason of her death, a fee simple estate is vested in her, the defendant, with the right of immediate possession under and by virtue of said deed to her, said defendant, from said Moses Kapaakea Kinimaka.

28. That by the said actions in ejectment the defendant seeks to take an unconscionable advantage of the above mentioned technical error in the chain of title of your petitioner. That said claims constitute a cloud upon the title of petitioner in and to the land aforesaid, and that defendant is using the claim that the legal title to said land is in her as aforesaid to harass plaintiff with litigation, and to cloud its title and to shut plaintiff out of the due and full enjoyment of the same.

29. That it would be inequitable to permit the present defendant, under the facts and circumstances as set forth in this Bill of Complaint, and as now existing, to prosecute her said action of ejectment against this plaintiff. That if, in fact and in law, the legal title to said described lands is now in said defendant, then it is a bare legal title, which she is holding wrongfully, and against conscience and the right of this plaintiff.

138 And said plaintiff, by the leave aforesaid, hereby amends paragraph (*d*) of the prayer of said Amended Bill of Complaint, so that the same will read as follows, that is to say:

(*d*) That, in the event that this honorable court shall find and decree said deed from said Moses Kapaakea Kinimaka to said defendant, as set forth in paragraph numbered 25 of this Bill of Complaint, conveyed to said defendant a legal title, in or to the property, or any of the property here in question,—then that said defendant may be declared to be the trustee of all the right, title and interest formerly held or owned by said Kaniu Kinimaka, David Leleo Kinimaka and Moses Kapaakea Kinimaka, or any or either of them, in and to the lands in question, or any thereof, for the benefit of the petitioner herein, as cestui que trust, and that as such trustee, she may be ordered and decreed to convey any and all such interests to the said petitioner.

Dated this 26th day of March, 1912.

(Signed) KAPIOLANI ESTATE, LIMITED,
By JOHN F. COLBURN, *Its Treasurer.*
(Signed) C. W. ASHFORD,
Attorney for Plaintiff.

Endorsed: E. 1246. In the Circuit Court for the First Circuit Territory of Hawaii. Kapiolani Estate, Limited, Plaintiff. vs. Mary H. Atcherley, Defendant. Amendments to Plaintiff's Amended Bill of Complaint. Filed Mar. 29, 1912, at 9:35 o'clock A. M. J. Marcallino, Clerk. C. W. Ashford and Castle & Withington, Attorneys for Plaintiff.

139 In the Circuit Court of the First Circuit, Territory of Hawaii, at chambers. In Equity.

KAPIOLANI ESTATE LIMITED, a Hawaiian Corporation,

vs.

MARY H. ATCHERLEY, LYLE A. DICKEY, and E. M. WATSON, Defendants.

Bill for Injunction.

Answer of Lyle A. Dickey and E. M. Watson.

Lyle A. Dickey and E. M. Watson, defendants in the above entitled cause, now and at all times hereafter saving to themselves all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the amended bill of petition contained, for answer thereto, or to so much thereof as the defendant is advised it is material or necessary for them to make answer to, answering say:

1.

That they admit the allegations of paragraphs 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 14,

2.

That they admit that on July 19, 1898 (not June as alleged in section 15 of petitioner's Amended Bill) said Kalakaua filed a petition of which Petitioner's Exhibit J is a true copy.

3.

They admit that a summons was duly issued of which exhibit K. of petitioner's bill is a true copy and that the same was served upon Richard Armstrong by leaving a certified copy of the same with A. F. Bates the attorney of said Richard Armstrong July 21st 1858 and that the same was served upon said Pai by leaving a certified copy of the same at her usual place of abode with a member
140 of her family said Pai being absent at Hawaii, July 21st 1858 but deny that any other service was made, and do not admit that said service was "duly" made as alleged in petitioner's amended bill.

4.

That they admit the allegations of section 17 of petitioner's amended bill of complaint.

5.

That as to allegations of section 18 of petitioner's amended bill, they admit that upon August 18 1858 in Chambers before the Honorable E. H. Allen, Chief Justice of the Supreme Court of the Kingdom of Hawaii, evidence was taken and the cause begun by the said petition of July 19, 1858 of David Kalakaua was heard or at least partially on the merits and that Exhibit M. of Petitioner's Amended Bill is a true copy of the minutes of the Clerk of the Court as to the proceedings and of his notes of the oral evidence taken; that they do not admit but deny that said exhibit M. contains a full record of the documentary evidence received in the case.

6.

That they admit the allegations of section 19 of Petitioner's Amended Bill but not that said decree was a valid and legal decree.

7.

That they admit the allegations of section 20 of Petitioner's Amended Bill.

8.

That they admit the allegation of section 21 of Petitioner's Amended Bill of Complaint that Richard Armstrong never executed a deed of said premises to David Kalakaua but neither admits nor denies the other allegations of said section, being ignorant thereof.

9.

That they are ignorant as to the matters alleged in sections 22, 23 and 24 and neither admit nor deny the same but leave petitioner to its proof thereof except that they admit that Kaniu Kinimaka, David Leleo Kinimaka and Moses Kapaakea Kinimaka at-
141 tained majority as therein alleged and that the deeds referred to in section 22 of Petitioner's Amended Bill have all been executed by the parties named in said section and recorded as therein alleged and they deny that any of said deeds passed any title to the premises described in section 2 of Petitioner's Amended Bill.

10.

That they admit the allegations of section 25 of Petitioner's Amended Bill as later amended this year and further allege that by deed dated December 28 1907 and recorded in the Office of the Registrar of Conveyances in Honolulu January 15 1909 in Book 315 at page 142 said Mary H. Atcherley conveyed to these defendants an undivided one-half of said premises and these defendants claim that by virtue of said deed a fee simple estate is vested in them with right of immediate possession of said undivided one-half of said premises.

11.

That they deny the allegations of section 26 of Petitioner's Amended Bill of Complaint and allege that by three deeds dated August 30 1902 and May 29 1905, true copies whereof are attached to the supplementary answer of Mary H. Atcherley herein which these defendants here refer to and make a part hereof the petitioner has parted with all its estate in the land involved in this case if it ever had any estate therein.

12.

That they admit the allegations of section 27 of Petitioner's Bill of Complaint.

13.

And further answering, these defendants say that Lewers and Cooke Limited, grantee in the two deeds from Petitioner called exhibits B and C of the supplemental answer herein of Mary H. Atcherley, January 29 1906 brought suit in the Court of Land Registration to register its title to the land described in said deeds. That a decree was entered in said court September 16 1907 that Lewers and Cooke Limited had a good title entitled to reg-
142 istration. That on appeal by Mary H. Atcherley said decree was set aside by the Supreme Court of the Territory of Hawaii and decision filed March 5 1908 holding that Lewers and Cooke Limited had no title, legal or equitable in said land, which decision is printed in Vol. 18 Hawaiian Reports pp. 625-640 and is here referred to and made a part hereof; That Lewers and Cooke Limited filed a motion for rehearing and on consideration thereof the Supreme Court of Hawaii rendered a decision May 4 1908 contained in Vol. 19 Hawaiian Reports pp. 47-51 which is here referred to and made a part hereof; That the Supreme Court of Hawaii remitted the said case to the Court of Land Registration for further proceedings; That said Court entered a decree dismissing the petition of Lewers and Cooke Limited for registration; That Lewers and Cooke Limited appealed to the Supreme Court of Hawaii upon points of law; That the Supreme Court of Hawaii modified the decree of the Court of Land Registration and March 24 1909 entered a final decree that Lewers and Cooke Limited had no title, legal or equitable to said land, a true copy of which decree is attached as exhibit D to supplemental answer of Mary H. Atcherley and by reference made a part hereof; That Lewers and Cooke Limited appealed from said decree to the Supreme Court of the United States and filed 28 assignments of errors, a true copy of which assignments of errors is attached to the supplemental answer of Mary H. Atcherley as exhibit E. and is by reference made a part hereof; That the Supreme Court of the United States December 18 1911 rendered a decision affiming said decree which decision is published in Vol. 222 U. S. Reports and is here referred to and made a part hereof; That said decree of the Supreme Court of Hawaii is in full force and effect.

That said proceedings in the Court of Land Registration, Supreme Court of Hawaii and Supreme Court of the United States were upon the merits of the case and the cause of action so finally adjudicated was the same right and cause of action as that on which the complainant in this case has founded its bill.

That the petitioner, Kapiolani Estate Limited had notice
143 of said proceedings in the Court of Land Registration, Supreme Court of Hawaii and Supreme Court of the United States.

And these defendants claim that all points raised by the Amended Bill of Complaint of petitioner in this case have been considered and finally decided in said proceedings; that said proceedings are res adjudicata; that Kapiolani Estate Limited is estopped by its laches and deeds from now relitigating what has been finally decided as to its grantee's title; and that said decisions are binding on this court.

These defendants admit the allegations of section 27 of Petitioner's Bill and deny all the claims of sections 28, 29, 30, 31 and pray that the temporary injunction now in force in this case be set aside and the petition of Kapiolani Estate be dismissed at Petitioner's costs.

Honolulu, May 29, 1912.

(Signed) LYLE A. DICKEY,
E. M. WATSON,
By LYLE A. DICKEY,
His Attorney.

TERRITORY OF HAWAII,
City and County of Honolulu, ss:

Lyle A. Dickey, being first duly sworn, on oath states that he knows the contents of the foregoing answer and that the facts therein stated are true.

(Signed) LYLE A. DICKEY.

Subscribed and sworn to before me this 29th day of May 1912.

(Signed) C. H. DICKEY,
[SEAL.] *Notary Public.*

144 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Equity.

Equity. No. 1246.

KAPIOLANI ESTATE, LIMITED, Plaintiff,
vs.
MARY H. ATCHERLEY, LYLE A. DICKEY, and EDWARD M. WATSON, Defendants.

Decree.

The above entitled cause having been remanded to this Court for further proceedings, in and by a decision of the Supreme Court

89

of said Territory rendered, upon the appeal of said plaintiff therein, on the 7th day of April, 1903; and said Defendant Mary H. Atcherley, (who was then sole Defendant herein,) having amended her answer as previously filed in said cause; and said Plaintiff having, thereafter, by leave of Court, filed certain amendments to its previously amended Bill of Complaint herein; and said Lyle A. Dickey and Edward M. Watson having been, by consent of parties, joined as parties Defendant herein together with said Mary H. Atcherley, after the filing of all the pleadings herein; and it have been agreed between parties that said pleadings respectively should and shall apply to and be binding upon said Defendants Dickey and Watson, in a like manner as though they, the said Dickey and Watson, had been named as Defendants in the original pleadings herein;—

And said cause having come duly and regularly on for trial before the undersigned, the Second Judge of said Court; and the Court having heard and considered the evidence adduced upon said trial, as well on the part of said Plaintiff as on the part of said Defendants; and said parties, by their respective Counsel,
145 having argued to the Court the Law and the facts involved herein, and submitted the same for decision by the Court, and the Court being fully advised in the premises;—the Court now finds and adjudges that the allegations of fact contained in Plaintiff's Bill of Complaint, as finally amended herein, and in its said replication, are true; and the Court further finds and adjudges that said Defendants, and each of them, are estopped by record from further claiming or litigating against or in opposition to the claim of said Plaintiff, the title to the land and premises described in said Bill of Complaint as finally amended; and that said Defendants now hold the legal title to said land and premises, (hereinafter more particularly described, as tenants in common, in the proportion of one-half thereof in and to said Defendant Ma-y H. Atcherley, and one-quarter thereof in and to each of said Defendants, Dickey and Watson.

And the Court further finds and adjudges that the title and titles so held by said Defendants respectively is and are a naked legal title, and that, as to said Defendants respectively, the equitable title to said land and premises is in said Plaintiff; and that the title and titles so held by said Defendants respectively is and are held by them respectively as Trustee for said Plaintiff, and that said Defendants, and each of them should be decreed to execute a conveyance and conveyances of their, and each of their legal title therein to said Plaintiff; and that all and singular the matters pertaining to the title to said land and premises have heretofore been duly and regularly adjudicated, between the predecessors in title of said Plaintiff, and the predecessors in claim of said Defendants, respectively, and that the same are now res adjudicata between the parties hereto; and that, because of said facts, said Defendants, and each of them, and all persons claiming or to claim by, through or under them or either of them, should be permanently enjoined from further prosecuting that certain action in ejectment, now pending in and before said Circuit Court, upon the Law side thereof,

wherein said Defendant Mary H. Atcherley is party Plain-
146 tiff, and said Plaintiff herein is party Defendant, and which said action is numbered, upon the records of this Court, Law, No. 4997.

Wherefore it is ordered, adjudged, and decreed, that said Defendants be, and each of them hereby is required and commanded, within 30 days from the date of this decree, to execute, ackknowledge and deliver to said Plaintiff, Kapiolani Estate, Limited, an Hawaiian Corporation, a good and valid conveyance and quit claim of all and singular their, and each of their right, title, interest, claim and demand, of in and to, the land and premises described in said Bill of Complaint, as finally amended, said premises being situated in Honolulu, City and County of Honolulu, Territory of Hawaii, and being Apana 1 of Land Commission Award 129, Royal Patent 1602 to Kinimaka.

And it is further ordered, adjudged, and decreed, that if said Defendants, or any or either of them shall fail, neglect or refuse to so execute, acknowledge and deliver such conveyance as aforesaid within Thirty (30) days, next following the date of this decree, then the Clerk of this Court, as a Commission of this Court, for such purpose hereby constituted and appointed, shall execute, acknowledge and deliver to said Plaintiff a conveyance of all and singular the right, title, claim, interest and demand of any and each of said Defendants who so fail, neglect, or refuse to execute, acknowledge and deliver such conveyance as is hereinabove required and commanded to be made and done.

And it is further ordered, adjudged and decreed, that said defendants, and each of them, and all persons claiming or to claim by, through or under them or either of them, are hereby strictly forbidden to do any further act or take any further step in the prosecution of that certain action in ejectment, now pending in this Court, on the law side thereof, wherein said Defendant Mary H. Atcherley is party Plaintiff, and said Plaintiff herein is party Defendant, and which said action is numbered upon the records of this Court, Law No. 4997.

And it is further ordered, adjudged, and decreed, that said
147 Plaintiff do have and recover its legal costs in this cause, from and against said Defendants.

Dated this 2nd day of December, 1912.

(Signed) WM. L. WHITNEY,
Second Judge of the Circuit Court
for the First Circuit, Territory of Hawaii.

Endorsed: Original. E. No. 1246. R. 2/21. Circuit Court, First Circuit, Territory of Hawaii. Kapiolani Estate, Limited, Plaintiff, vs. Mary H. Atcherley, Lyle A. Dickey, and Edward M. Watson, Defendants. Decree. Filed Dec. 2, 1912, 9:35 A. M. A. K. Aona, Clerk. C. W. Ashford and Castle & Withington, Attorneys for Plaintiff

148 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. At Chambers. In Equity.

No. 1246.

KAPIOLANI ESTATE, LIMITED, Plaintiff,
vs.
MARY H. ATCHERLEY, LYLE A. DICKEY, and EDWARD M. WATSON, Defendants.

Appeal and Notice of Appeal.

Now came Mary H. Atcherley, Lyle A. Dickey and Edward M. Watson, defendants in the above entitled suit, and hereby give notice of their intention to appeal and hereby do appeal to the Supreme Court of the Territory from that certain decree herein, dated December 2, 1912, and signed by the Honorable W. L. Whitney, Second Circuit Judge.

Dated Honolulu, December 3, 1912.

MARY H. ATCHERLEY,
EDWARD M. WATSON,
By Their Attorneys, A. A. W.
(Signed) LYLE A. DICKEY.

Endorsed: E. 1246. Circuit Court, First Circuit, Territory of Hawaii. Kapiolani Estate, Ltd., Plaintiff, vs. Mary H. Atcherley, et al., Defendants. Appeal and Notice. Filed Dec. 4th, 1912, at 8:35 o'clock A. M. John Marcallino, Clerk. Thompson, Wilder, Watson & Lymer, Lyle A. Dickey, 3-11 Campbell Block, Honolulu, Attorneys for Defendants.

149 In the Supreme Court of the Territory of Hawaii, October Term, 1912.

KAPIOLANI ESTATE, LIMITED,
v.
MARY H. ATCHERLEY, LYLE A. DICKEY and EDWARD M. WATSON.

Appeal from Circuit Judge, First Circuit.

Argued February 3, 1913; Decided March 3, 1913.

Robertson, C. J.; Perry and De Bolt, JJ.

Stare Decisis—decision of courts of last resort binding on inferior tribunals.

The decision of a court of last resort are binding upon all tribunals inferior to it. Held, accordingly, that a decision made by the Supreme Court of the United States following the opinion of

the Supreme Court of Hawaii upon a matter of local law is binding upon this court in another case notwithstanding the belief of this court that its former opinion was wrong.

150 *Opinion of the Court by Robertson, C. J.*

(Perry, J., Dissenting in Part.)

This is a bill to declare a trust, to direct a conveyance, and for an injunction against the prosecution of an action at law. The defendants appeal from a decree entered granting the relief prayed for.

It will be necessary in order to properly understand the case to refer to the former decision in this case reported in 14 Haw. 651, and to the cases of Atcherley v. Lewers & Cooke, 18 Haw. 625, and In re Lewers & Cooke, 19 Haw. 47 and 334; and to the report of the same case on appeal, Lewers & Cooke v. Atcherley, 222 U. S. 285.

Since this case was last before this court Lyle A. Dickey and Edward M. Watson have been joined as parties defendant, Mrs. Atcherley having executed a deed purporting to convey to them an interest in the land in dispute.

Without repeating in detail the facts and circumstances which led up to the controversy between these parties and have brought it again to the attention of this court it may be well to refer to those matters which may properly be regarded as the leading features of this litigation.

In so far as rights of property in land existed and were recognized in these Islands prior to the establishment of the land commission, the chief-ess Kaniu was owner of the land in dispute when she gave it by oral will, which later was duly proven in court, to her foster son, David Kalakaua, a boy of about seven or eight years of age; that by the same will the husband, Kinimaka, was made the testamentary guardian of the child to "take charge" of the land for him; that upon the establishment of the land commission Kinimaka presented a claim in his own right and received an award of this and other land in his own name. On reaching the age of majority Kalakaua, on December 30th, 1856, brought suit in equity against Kinimaka seeking to have the defendant declared to be a trustee for the plaintiff and to compel a conveyance to him of cer-
151 tain lands, including the land in dispute; that Kinimaka died without having filed an answer in the cause; that a new suit was commenced against the widow and minor children (by his second wife) of Kinimaka; this suit was contested by the widow and the duly appointed guardian of the minor defendants, testimony was taken, and the case proceeded to a point where the plaintiff filed a discontinuance except as to the land in dispute and one other piece, it being recited in the discontinuance that the plaintiff, "in consideration of certain sums of money paid by Kinimaka during his lifetime, for his (plaintiff's) use and benefit, relinquishes all right to any and all land now included in the Estate of said Kinimaka, and set forth in the petition in the above entitled cause, and

discontinue my action for the same, saving and excepting" two lands; that on the same day a decree was entered in the cause directing Armstrong as guardian of the three children to convey to the plaintiff the two lands referred to; and that the conveyance so directed to be made seems never to have been executed. Had the entry of that decree been followed by the conveyance to Kalakaua of the lands in question it is probable that this litigation would not have occurred. Whether Kinimaka took the award of this land in his own name in wilful fraud of the right of his ward or in ignorance of those rights and under the belief of the validity of his own claim probably will never be known, and it is impossible to say at this time whether the decree made by Chief Justice Allen in 1858 was entered pursuant to a compromise entered into by the parties, or whether it resulted from a realization on the part of the guardian of the infant defendants and his counsel of the justness of Kalakaua's claim and an unwillingness on their part to attempt the further maintenance of a position at least morally untenable, whatever might be said of the legal aspect of the affair, or otherwise. The record shows that "Mr. Bates (attorney for Pai and Armstrong) admitted that at the time of making the will the whole property was given to David (Kalakaua), that at the time of her (Kaniu's)
death she said to her husband (Kinimaka), standing by at
152 the time, that she wished him to take charge of all her property which she had willed to David." It is quite clear that the entry of a decree in favor of the defendants in the suit of 1858 would have perpetrated an injustice on Kalakaua. To the limited and qualified extent that lands were the subject of private ownership before the creation of the land commission the land in question belonged to Kalakaua; it was his right to apply for an award of title; that right was protected by constitutional guaranty; and it was the duty of his guardian to make application for a title in his behalf; but Kalakaua was deprived of the land without his consent. Perhaps it was supposed that the decree entered by Chief Justice Allen in Kalakaua v. Pai and Armstrong in 1858 was self-executing and binding on all the defendants, and that the making of a deed was unnecessary, at any rate the parties in interest acquiesced in the decree, and Kalakaua and those claiming under him remained in undisturbed possession of the premises until Mary A. Atcherley, who had obtained a deed from Moses Kapaakea Kinimaka brought ejectment against the Kapiolani Estate, Limited, and others on July 31st, 1901. This court (14 Haw. 651) reversed a decree sustaining a demurrer to a bill for an injunction against the maintenance of the ejectment case. It was then held that the decree of 1858 was not ambiguous; that it directed the conveyance to the plaintiff of the minor defendants' interests in the land in dispute; that there was not a lack of jurisdiction over the parties; that the decree was not void for any reason then advanced; that the attack on the decree was a collateral attack; that it was not a consent decree; and that while the court had power to examine into the propriety of the decree it would not, under the circumstances, do so. In the Lewers & Cooke case, 18 Haw. 625, this court said that

the decree of 1858 "has all the appearances of a compromise decree, consented to by the guardian of minors" (p. 639) but declined to review the ruling made in 14 Haw. 651, that that was not a consent decree, but held that "an additional point not decided in the proceedings on demurrer is decisive against the right of
153 the petitioners to a registered title, which would be substantially an enforcement of the decree of 1858" (18 Haw. 632), the point referred to being that the award of the land commission in favor of Kinimaka, being final and conclusive, was binding on Kalakaua and the decree of 1858 was, therefore, erroneous, if not void. The suit before Chief Justice Allen was regarded as an attack upon the judgment of the land commission, the court saying, "If this court, therefore, shall enforce the decree of 1858, or by registering the title of the petitioner treat the decree as enforceable, it will be the first time in the judicial history of Hawaii that a land commission award shall have been set aside upon any pretext whatever" (18 Haw. 638.) The criticism of the language used in the opinion in the case of Estate of Kaniu, 2 Haw. 82, made in Estate of Kekauluohi, 6 Haw. 172, was approved, although it was conceded that "the actual decision of that case was not in conflict with the principles above cited, for the estate of Kaniu consisted of personal as well as real property, and the decision was to admit the will to probate" (18 Haw. 638.) It was held that the title to the land, equitable and legal, was in Mary H. Atcherley, and the decree of the court of land registration registering the title of Lewers & Cooke, Limited, was reversed. In denying a petition for a rehearing of that case (19 Haw. 47), it was held that the decree of 1858 was not controlling under the doctrine of stare decisis as that doctrine "is applied only when the rights of innocent purchasers for value have intervened as to the particular property;" it was said that there had been "no reversal of any findings of fact of the court of land registration;" and as the case in 14 Haw., it was pointed out, that, as a decision on demurrer, it was "by no means conclusive as predicting the final determination of the case," and the court was of the opinion that the case was not overruled. Then followed the entry in the court of land registration of a decree denying the petition of Lewers & Cooke, Limited and upon appeal from that decree this court made a decree denying the petition without prejudice to the petitioner's right to obtain a registered title to other land
154 which was included in the petition. On appeal to the supreme court of the United States the decree was affirmed.

Notwithstanding the statement made in the Lewers & Cooke case (19 Haw. 48) that there had been no reversal of the facts found by the court of land registration the fact found by that court that Kinimaka "was the natural guardian of the minor" was not included in the findings of fact certified up by this court on the appeal to the United States supreme court. And the fact that the guardianship relation existed, vitally important though it was, seems to have received scant consideration in that case. That Kinimaka was the testamentary guardian of Kalakaua's property seems to be beyond the range of dispute at this time. If the relation ex-

isted in fact a question as to the regularity of the appointment would not prevent the assertion of any rights the ward would otherwise have against the guardian. "It is not essential that a legal guardianship should exist; the doctrine (constructive fraud) applies wherever the relation subsists in fact." 2 Pom. Eq. Jur. Sec. 961.

We are satisfied that this court fell into error in the Lewers & Cooke case in taking the view that the equity suit before Chief Justice Allen constituted an attack on the award of the land commission and that the decree in that suit amounted to a setting aside of the award. None of the prior decisions in this jurisdiction which were cited in support of the view taken are authority for the conclusion reached, as an examination of them will show.

Kukiiahu v. Gill, 1 Haw. 54. That was an action of trespass upon land. The defendant claimed under a royal patent dated in 1849 and an anterior deed from one Kalua. Plaintiff claimed under a royal patent dated in 1850 which was based on a land commission award. As to the merits of the respective claims under the patents, it was pointed out that that of the defendant was subject to the rights of natives and therefore, subject to the plaintiff's title under his award. And as to the claim under the deed of Kalua it
155 was shown that both the plaintiff and Kalua were claimants for the land before the land commission and that the contest was decided in favor of the plaintiff. It was the judgment of the land commission in that contest that resulted in the award to the plaintiff, and it was that judgment, which under the law was final unless reversed on appeal to the supreme court, there having been no such appeal, that was held could not be reopened on the allegation that the plaintiff had prevailed before the land commission upon false testimony. It was attempt- to show in an action at law that the award of the land commission was erroneous.

Kalakaua v. Keaweamahi, 4 Haw. 577. In that case the plaintiff sought relief in equity because of fraud alleged to have been committed by defendants' ancestor upon the ancestor of plaintiffs' grantor. The case was heard upon bill and demurrer. It appeared that one Kaunuohua (under whom plaintffs claimed) who was the wife of Moehonua (under whom defendants claimed) made claim for certain land before the land commission and died pending action by the commission; that after her death the lands were awarded to Moehonua (Kaunuohua for Moehonua); it was alleged that no new proofs were taken by the land commission after Kaunuohua's death, and it was contended that the award was made as it was through Moehonua's fraud.

The court held it could not assume that the land commission had no authority for issuing the award in the form in which it was issued, and that the failure to record evidence to sustain the award would not vitiate it. Other points were involved. The demurrer was sustained with leave to amend. In that case also it was attempted to show that the award was erroneous. A review of the proceedings of the land commission was sought. If Kaunuohua's heirs, who, it must be assumed were sui juris, appeared and contested the matter with Moehonua, the decision of the land com-

mission against them was conclusive in the collateral proceeding, and if they did not contest with Moehonua they were in default and the award was equally conclusive. Their only possible
156 remedy was by appeal from the judgment of the land commission.

Kaai v. Mahuka, 5 Haw. 354. That was a bill to declare a trust, but there was no element of trust involved. It seems that two brothers Mahuka and Kaai, were entitled to an award of land in common; that Mahuka presented a claim for the land to the land commission in his own name, and at the hearing admitted that his brother had an equal right with him; that the award was headed "Mahuka and Kaai" but the grant was to Mahuka alone. The learned chancellor said that Kaai "may have, for all we know, relinquished his claim by an unrecorded deed now lost. It is to be presumed that he was aware of the award to Mahuka alone, and that he consented to it." Clearly, if Kaai had any fault to find with the award it was for him to follow the remedy which the law gave him by appealing to the supreme court.

That it was an attempt to correct a supposed error of the land commission which involved an attack on the judgment is shown by the remark made by this court that "Every year which passes increases the force of the reason which demands that the adjudications of the land commission be not now re-examined."

Estate of Kekauluohi, 6 Haw. 172. That was a petition in probate to establish a lost will before Mr. Justice Judd in 1876. After holding that the contents of the will, which, it was claimed, devised certain lands, some of which the testatrix owned and some she did not own, had not been proven, the learned justice pointed out that the fact that the will must have taken effect upon the death of the testatrix, June 7th, 1845, furnished a basis for claims for land "arising previously to the tenth day of December, 1845," which should have been, and, it seems, in fact were, presented to the land commission for confirmation, furnished an additional reason for refusing the application.

Thurston v. Bishop, 7 Haw. 421. That was an action of ejectment instituted by the minister of the interior of the
157 Hawaiian Kingdom against the trustees of the estate of B. P. Bishop, deceased, to recover certain land held by the defendants. The plaintiff claimed that as the land had not been awarded by the land commission or granted by the government the title was in the government. The court found that the sole question involved was whether Lot Kamehameha, from whom the defendants claimed, was barred of his rights in the land (it being conceded that he would have been entitled to an award of the land had his claim been presented) by reason of his own or any one's failure to present the claim within the time required by law to the land commission, Lot Kamehameha being a minor. The question was answered in the affirmative. It was held that it was the duty of the minor's guardian (his father) to have made claim for the land on behalf of his ward and that his failure so to do was binding on the minor.

The question now presented is whether a minor on coming of

age could obtain relief in equity against a guardian who had, in fraud of his ward, presented a claim and obtained in his own name an award from the land commission of title to the minor's land. This question was neither involved nor discussed in any of those cases.

The case of the guardian of a minor obtaining an award in his own name of land belonging to his ward is analogous to the case of a guardian who purchases land with money belonging to the ward, and, in violation of his fiduciary duty, intentional or otherwise, takes the title in his own name. In such a case it is well settled, equity, regarding the land as being the property of the ward, will declare and enforce a constructive trust in favor of the ward and order the conveyance of the legal title. 3 Pom. Eq. Jur. Secs. 1052, 1058.

Where, as was shown in the case of Kalakaua v. Pai and Armstrong, an award of land had been obtained by the guardian during the ward's minority, and the ward had asserted his right without delay after coming of age by instituting suit against the guardian and, upon his death, his widow and devisees, the appropriate relief, if complainant was entitled to relief, undoubtedly would be
158 a declaration of trust and an order to convey the legal title. The bill of complaint in that case alleged the death, testate, of Kaniu in 1843; the devise to the complainant who at that time was an infant; the designation of Kinimaka as testamentary guardian of the property of the complainant; the discovery, on complainant's coming of age, that his guardian had fraudulently procured certain awards of lands in his own name; the admission of Kaniu's will to probate; the title to the lands in Kinimaka in trust for the use and benefit of the complainant; the death of Kinimaka in 1857, leaving a widow and three children; and that the procuring of said awards by Kinimaka in his own name was contrary to equity and good conscience. The complainant prayed for a decree declaring that Kinimaka procured the awards and held possession of the lands for the use and benefit of the complainant; that the widow and the guardian of the children be ordered to convey all their right, title and interest in said lands to the complainant; and for further relief. Counsel for the appellants contend that the fact that at the hearing in that suit the complainant put in evidence the record of the land commission in the matter of Kinimaka's application shows that a review of the proceedings before the commission was attempted. We do not accept that view. That record was properly adduced to show that Kalakaua's claim had not been presented to the land commission. The theory upon which the suit proceeded and the object aimed at preclude the notion that it was desired to have the award to Kinimaka set aside or annulled. The upholding of the award was essential to the success of Kalakaua's suit. To attack and set aside the award would have been to take from Kinimaka's representatives the very title which the complainant was seeking to compel them to convey to him.

If A, by fraud, obtains a judgment against B, B may obtain equitable relief against the enforcement of the judgment by showing

the fraud and asking equity to intervene because of it. Broad-
159 ly speaking it may be called an attack on the judgment though equity acts in personam. But if A obtains a valid judgment against B and secures the fruits of that judgment, and by reason of A's relation to C, A is the constructive trustee for C of those fruits, C may proceed in equity to take them from A. The suit of C against A clearly would not constitute an attack on the judgment against B, but would assume and maintain its validity. Such is the case here. The suit before Chief Justice Allen was not an attack on the award of the land commission; it was not an attempt to review the proceedings of the land commission or to correct or set aside the award to Kinimaka. On the contrary, it assumed the correctness of the judgment of the land commission and the validity of the award. It was an entirely new proceeding based upon the assertion that the legal title to the land was vested in Kinimaka and his heirs by and under a valid award issued by the land commission, but that because of the other facts averred, the defendants held as constructive trustees for the benefit of the plaintiff. Furthermore, the new proceeding sought to assert a right which had accrued to the complainant since the date of the award to Kinimaka, namely, the right of a minor, upon his reaching his majority, to demand of his guardian a full and true report of his acts with reference to the trust property, an honest accounting of all thereof, and a conveyance of such of it as stood in the guardian's own name. If Kinimaka had failed to present any claim for this land to the land commission either on behalf of his ward or in his own name no title would have been acquired. Thurston v. Bishop, supra. Kalakaua could not have followed the property because it would then have been beyond reach. But having obtained the award, Kinimaka, or those claiming under him, could not be allowed to say that the claim of Kalakaua had been litigated and disapproved by the land commission either on the theory that Kinimaka based his claim on an alleged gift from Liliha, or otherwise. Kalakaua's claim to this land as against Kinimaka was not presented to the land commission and, consequently, was never passed upon by that
160 tribunal but that could not be attributed to any fault or neglect on the part of Kalakaua. There is an unmistakable analogy between the right of Kalakaua to the relief sought by him in the suit before Chief Justice Allen and the right of one to an injunction or other relief in equity against a judgment at law fraudulently obtained where the circumstances were such that the fraud could not have been shown in defense of the action. Such a case ordinarily is not regarded as an attack upon the judgment or a review of the proceedings had in the law action, but as the assertion and recognition of a distinct and theretofore unlitigated right. "The suit in chancery does not draw in question the judgment and proceedings at law or claim a right to revise them. It sets up an equity independent of the judgment which admits the validity of that judgment, but suggests reasons why the party who has obtained it ought not to avail himself of it. It proposes to try a question entirely new, which has not been and could not be litigated at law.

It may be brought before the commencement of a suit at law, pending such suit, or after its decision by the highest law tribunal." Parker v. Circuit Court, 12 Wheat. 562, 564. See to the same effect, Johnson v. Waters, 111 U. S. 640, 667; Arrowsmith v. Gleason, 129 U. S. 86, 101; and Marshall v. Holmes, 141 U. S. 589.

Within these principles, then, the decree of 1858 was not erroneous, but right. We do not impugn, but re-affirm, the doctrine so often announced that the awards of the land commission were final and conclusive if not appealed from within the time allowed by the statute, but we do say that the proceeds of such an award, like the fruits of a judgment at law, may be subjuected to the equitable rights of others where those rights, if existing prior to the judgment, were suppressed through fraud committed by him who obtained the award upon one who could not act for himself, or have accrued since. To hold otherwise would be to place awards of the land commission upon a plane higher than that accorded to the most solemn judgments of courts of law acting within unquestioned jurisdiction.

161 There is nothing in the judicial history of these Islands which would warrant us in according such a position to the judgments of the land commission. It does not militate against the view here taken that the land commission had jurisdiction to consider equitable as well as legal claims, for the circumstances of this case, which must be admitted to be exceptional, show that notwithstanding the broad powers of the land commission, a case may have occurred where a claim failed of presentation not merely without fault on the part of the one who, being incapable of acting on his own behalf, had the right to have it presented for him, but through the fraud of the one upon whom the law imposed the duty of presenting it on the other's behalf who successfully asserted it in his own name.

If the decree in Kalakaua v. Pai and Armstrong was right it ought to be enforced. If the decision in the Lewers & Cooke case was correct the present bill should be dismissed, but if it was wrong, in justice to the appellee, it ought not to be followed if it can be avoided.

Being of the opinion that this court was wrong in the conclusion reached in the Lewers & Cooke case, and that the decree of 1858 was not "erroneous in a fundamental principle," and, for the reasons stated in the former opinion in the case at bar, should not be reopened, we should feel inclined to depart from the ruling made in the Lewers & Cooke case were we not bound by it because of its having been affirmed by the United States Supreme Court.

Counsel for the appellants contend that under the decree in the Lewers & Cooke case the whole matter is res judicata. But as the appellee was not a party to that case and is not a privy of Lewers & Cooke, Limited, the ground is untenable. Counsel for the appellee urge the doctrine of "the law of the case," invoking the former decision in the case at bar. Both sides seem to assume that the decisions in the two cases are in conflict. The Lewers & Cooke case, however, was decided on a point which was not touched upon

162 in the decision on the demurrer in the present case, and although it was held in that case that the decree of 1858 ought

not to be enforced the decision rested upon ground which was not inconsistent with that taken in the prior decision in the case at bar. The rule of the law of the case, therefore, does not, as counsel have supposed, compel the choice of following one of two conflicting decisions. We think the application of that rule is not involved here. The point upon which this case now hinges was adjudicated in the case in which the appellee was not a party, but was not considered when this case was last before this court. In the Lewers & Cooke case the Supreme Court of the United States held that the decree made in Kalakaua v. Pai and Armstrong was erroneous and that the judgment of the land commission awarding the title to the land in dispute to Kinimaka was conclusive and binding against Kalakaua and those who claim through and under him. That decision is binding upon this court and we must follow it. "Under the rule of stare decisis, where a principle has been passed upon by the court of last resort, it is the duty of all inferior tribunals to adhere to the decision, without regard to their views as to its propriety, until the decision has been reversed or overruled by the court of last resort or altered by legislative enactment." 26 A. & E. Enc. Law (2nd ed.) 163. It makes no difference that in making that decision the Supreme Court followed the opinion of this court upon a matter of local law (222 U. S. 294) and that we now believe that that opinion was not well founded. If the former ruling is to be reversed the reversal is to be made by that court and not this. The most that we can do now is to respectfully point out wherein, in our judgment, the former opinion was wrong. This we have done believing it was our duty to do it, and with this our duty in the premises ends. Counsel for the appellee argue that we are not bound to follow the decision of the United States Supreme Court in the Lewers & Cooke case because the fact that Kinimaka was the guardian of Kalakaua at the time the claim for this land was pre-
163 sented to the land commission was not included in the findings of fact which were certified up on the appeal to that court. The facts remain, however, that the guardianship had been found as a fact by the court of land registration and that finding was before this court in the Lewers & Cooke case, and that the decree entered in that case was affirmed on appeal, with the result, as above stated, that we are concluded by the decree.

The decree appealed from is, accordingly, reversed, and a decree will be entered in this court dismissing the bill of complaint.

C. W. Ashford and D. L. Withington (Castle & Withington with them on the brief) for plaintiff.

Lyle A. Dickey pro se and A. A. Wilder (Thompson, Wilder, Watson & Lymer on the brief) for defendants.

(Signed) A. G. M. ROBERTSON.
(Signed) JOHN T. DE BOLT.

164 *Opinion of Perry, J., Concurring in Part and Dissenting in Part.*

The material facts in this case are precisely the same as those before this court and before the Supreme Court of the United States in the Lewers & Cooke case reported in 18 Haw. 625, 19 Haw. 47 and 222 U. S. 285. The only fact contended by the appellee to be before this court in the case at bar and not to have been before the Supreme Court of the United States in the Lewers & Cooke case is that Kinimaka was the guardian of Kalakaua at the time that the claim for the land was presented to the Land Commission. In addition to the fact noted in the majority opinion that the guardianship was found as a fact by the court of land registration, that that finding was before this court in the Lewers & Cooke case and that the decree in that case was affirmed on appeal, the answer to the contention is that this court deemed the fact of the alleged fraud, and therefore of the guardianship, immaterial and that the Supreme Court of the United States considered the case as though the fact of the guardianship was properly before it. "It is immaterial whether Kinimaka had received the land from Liliha or from Kaniu, and whether, if from Kaniu, he was guilty of actual fraud in procuring his land commission award or whether he acted under the honest belief that the disapproval of Kaniu's will by the King and the verbal giving of the lands to him was conclusive." 18 Haw. 625, 638, 639. "So it is said that Kinimaka was the natural guardian of Kalakaua, we presume on the evidence that Kaniu assented to a suggestion that she had better leave her property in Kinimaka's hands till Kalakaua came of age. But it would be going rather far to apply the refined rules of the English chancery concerning fiduciary duties to the relations between two Sandwich Islanders in 1846, on the strength of such a fact." 222 U. S. 285, 294. To grant the relief prayed for in this suit would be to attempt to disregard and render ineffectual the decision of the Su-
165 preme Court of the United States in the Lewers & Cooke case. I concur in the view that that decision is binding on this court in the case at bar and that, following it, the decree appealed from should be reversed and a decree entered dismissing the bill of complaint.

This sufficiently disposes of the case, but since the majority has expressed its view to the effect that the decisions of this court and of the Supreme Court of the United States are incorrect, I feel impelled to state, briefly, my views on the subject.

In my opinion the decisions referred to were correct in regarding the equity decree of 1858 as an attack upon the land commission award to Kinimaka and in declining to countenance the attack. In form, perhaps, it was not; but in substance and in effect, it was. The appellee invokes the general rule relating to the jurisdiction in equity concerning judgments obtained by fraud. "The suit in chancery does not draw in question the judgment and proceedings at law or claim a right to revise them. It sets up an equity inde-

pendent of the judgment which admits the validity of that judgment, but suggests reasons why the party who has obtained it ought not to avail himself of it. It proposes to try a question entirely new, which has not been and could not be litigated at law." Parker v. Circuit Court, 12 Wheat. 562, 564; and similar cases. That rule, however, can have no application to the case at bar or the suit in equity of 1858. If applied, it violates the spirit of the gift of Kamehameha III when he relinquished to the people his title to a large part of the royal domain and the spirit and the letter of the laws enacted to effectuate that gift. I cannot do better at this point than to quote from a familiar statement of the history of land titles in Hawaii. "There is a time in the history of every original nation not formed by colonization, when as it emerges from barbarism into civilization, titles to land may be said to have a beginning by positive institution of the people of such nation. Previous to the advent of Christianity to this country, in the early part of this century, Kamehameha I., as King by right of conquest, was the lord paramount and owner of all the land of this Kingdom. This
166 right continued in his successors until the reign of Kamehameha III. Under this King a government, under a constitution and laws, had its birth, superseding a government of the arbitrary will of the King. Claims of one character and another to the possession of land had grown up, but there was no certainty about them, and all was confusion; and finally, after years of discussion had between the King, the chiefs, and their foreign councillors, the plan of a Board of Commissioners to Quiet Land Titles was evolved, and finally established by law, for the purpose of settling these claims and affording an opportunity to all persons to procure valid paper titles emanating from the Government representing the sovereignty, the source of all title to land in this Kingdom, to the land which they claimed. As a part of this scheme Kamehameha III., with unexampled magnanimity, relinquished his claim of ownership as sovereign to over two-thirds of the entire territory of the Kingdom, in order that the same might be awarded to the chiefs and common people by the Land Commission. The Commission was authorized to consider possession of land acquired by oral gift of Kamehameha I., or one of his high chiefs, as sufficient evidence of title to authorize an award therefor to the claimant. This we must consider as the foundation of all titles to land in this Kingdom, except such as come from the King, to any part of his reserved lands, and excepting also the lists of Government and Fort lands reserved." Thurston v. Bishop, 7 Haw. 421, 428. Immediately prior, then, to the creation of the Land Commission, while claims of one character and another to the possession of land had grown up, there was no certainty about them. All was confusion. The constitution of October 8, 1840, sometimes referred to as the constitution of 1839 (see Thurston's Fundamental Law of Hawaii, p. 1), did, indeed, provide that "protection is hereby insured to the persons of all the people, together with their lands, their building lots, and all their property, while they conform to the laws of the

kingdom, and nothing whatever shall be taken from any
167 individual except by express provision of the laws"; but it also declared: "Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property. Wherefore, there was not formerly, and is not now any person who could or can convey away the smallest portion of land without the consent of the one who had, or has the direction of the kingdom." And in 1843 or 1844 we find the King disapproving of the will of Kaniu made subsequent to the date of the constitution. All was still chaos. It was for this very reason that the King, adopting an enlightened and progressive policy, made his gift. To me it seems impossible, under these circumstances, to regard Kaniu or upon her death her donee, Kalakaua, as holding even the beneficial or equitable ownership of the land as distinguished from the legal title. To sustain appellee's contention and uphold the decree of 1858 requires as an essential prerequisite the finding or the assumption that the equitable ownership at least, as that term is understood at the present day, was in Kaniu and from her passed to Kalakaua. Upon no other theory could Kinimaka or his heirs be declared to be trustees for Kalakaua.

The establishment of the Land Commission was a part of the scheme for the accomplishment of Kamehameha's purpose to relinquish his claims to the land and to vest titles in individuals. It was given power to hear and finally determine, subject only to appeal to the supreme court, all claims to land and to make awards therefor. In its creation it was recognized by the King and all others concerned that "the Hawaiian rulers have learned by experience, that regard must be had to the immutable law of property, in things real, as lands, and in things personal, as chattels; that the well being of their country must essentially depend upon the proper development of their internal resources, of which land
is the principal; and that in order to its proper cultivation
168 and improvement, the holder must have some stake in it more solid than the bare permission to evolve his daily bread from an article, to which he and his children can lay no intrinsic claim. They perceive by contact with foreign nations, that such is their uniform practice, and that the rules of right under that practice are contended for, understood and likely to be applied, in regard to the lands otherwise held at their hands by a tenancy incomprehensible to the foreigner. They are desirous to conform themselves in the main to such a civilized state of things, now that they have come to be a nation in the understanding of older and more enlightened governments." Principles of the Land Commission, R. L., p. 1171. The Board was given very broad powers. "A wide latitude is thus left to the Commissioners, who must, in passing upon the merits of each claim, first elicit from creditable witnesses, the fact or history of each; and thus assort or reconcile those facts to the provisions of the civil code, whenever there is a principle

in past legislation applicable to the point under consideration; but when no such principle exists, they may judically declare one, in accordance with ancient usage and not at conflict with any existing law, or at variance with the facts, and altogether equitable and liberal." Ib., 1175. It had power, of course, to refuse awards as well as to make awards. It considered equitable claims as well as legal (Ib., pp. 1169, 1175) as far as those terms could be applied to the kind of titles theretofore existing. It had power to make an award to one in trust for another. For illustrations of the exercise of that power see Kane v. Perry, 3 Haw. 663, and Kalakaua v. Keaweamahi, 4 Haw. 577. Claims of infants were presented by their parents or guardians and the statute prescribing a time limit for the presentation of claims made no exception in favor of infants. Minors were bound by the neglect of their guardians to present their claims. Thurston v. Bishop, 7 Haw. 421. So, also, were all persons bound by an award, unappealed from, even though it was procured by false testimony. Kukiiahu v. Gill, 1 Haw. 54.

169 In view of the uncertain tenures of land prior to the creation of the Land Commission, the King's gift and its terms, the provisions of the law intended for its accomplishment and the subsequent judicial declarations concerning the finality of the determination of the Land Commission, the equitable jurisdiction over the fruits of a judgment obtained by fraud cannot be successfully invoked. Relief was sought in 1858 and is sought now, not by reason of any facts occurring after the date of the award but by reason of facts all of which existed prior to the proceedings before the Land Commission. There was no new question before the equitv court in 1858, and there is none now, which could not have been litigated before the Land Commission. If Kinimaka in a spirit of fairness, at the time of the presentation of his own claim to the land, whether that claim was through Liliha or through Kaniu, made known to the Commission the attempted devise by Kaniu to Kalakaua or if the latter fact otherwise appeared in evidence at the hearing (the failure of the Commission to record evidence to sustain an award does not vitiate it, Kalakaua v. Keaweamahi, supra), it was within the province of the Commission (*a*) to refuse to award the land to Kinimaka, or (*b*) to award it to Kinimaka in trust for Kalakaua, or (*c*) to award it to Kalakaua, or (*d*) to award it to Kinimaka. If it decided whether correctly or incorrectly, either that Liliha had a stronger claim than Kaniu or that Liliha's claim was unfounded and that the King's disapproval of Kaniu's oral will was effective and his own subsequent gift to Kinimaka good, it was beyond the power of the equity court, directly or indirectly, to set aside that decision or render it nugatory. If, on the other hand, the fact of Kaniu's attempted devise to Kalakaua was not made known to the Commission, it was, as to Kalakaua, an instance of a minor bound by the failure of his guardian to present his claim, whether the failure was due to mere neglect or to fraud. Thurston v. Bishop and Kukiiahu v. Gill, supra; and other cases cited in 18 Haw. 625. Cases of ordinary guardians,

whose wards have, beyond controversy, the entire beneficial
170 ownership of the land, and of persons entrusted by another with money to purchase land, are not parallel. Neither Kaniu nor Kalakaua had any unassailable title, legal or equitable; they had at most a mere right to apply to the Land Commission for title. Thurston v. Bishop, 7 Haw. 421, 433. In the absence of an appeal to the supreme court the Commissioner's refusal or failure to award the land to them was conclusive. It is not as though a title existed, to be protected in equity. To the very existence of a title a land commission award was necessary.

The Hawaiian cases referred to in the opinion in the Lewers & Cooke case to my mind support and lead irr-istibly to the conclusion there reached, that the decree of 1858 was an indirect attack on the award, that the award of the Land Commission is a final adjudication of all claims to the land awarded existing prior to December 10, 1845, that such awards are, with the exceptions mentioned in Thurston v. Bishop, supra, the foundation of all titles to land in these Islands and conclusive against every form of attack save the appeal provided by law,—a tradition "fortified by logic and good sense." 222 U. S. 285, 294, 295. In 18 Haw. 625, 638, it was correctly said that if the decree of 1858 shall be now enforced, "it will be the first time in the judicial history of Hawaii that a Land Commission award shall have been set aside upon any pretext whatever." Announcement should not now be made judicially that an awardee may, in spite of the award, possibly have been the holder of the bare legal title in trust for another and that he or his successors may be decreed in equity to convey to that other.

(Signed) ANTONIO PERRY.

Endorsed: No. 680. Supreme Court Territory of Hawaii. October Term, 1912. Kapiolani Estate, Limited, v. Mary H. Atcherley, Lyle A. Dickey and Edward M. Watson. Opinion. Filed March 3, 1913, at 3:30 P. M. J. A. Thompson, Clerk.

171 In the Supreme Court of the Territory of Hawaii, October, 1912, Term.

KAPIOLANI ESTATE, LIMITED, Plaintiff,
vs.
MARY H. ATCHERLEY, LYLE A. DICKEY, and EDWARD M. WATSON, Defendants.

Decree.

This case having come on to be heard upon appeal by Mary H. Atcherley, Lyle A. Dickey and Edward M. Watson, from a decree rendered December 2, 1912, in the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers in Equity, by William L. Whitney, Second Judge of said Court, and having been argued by counsel on consideration thereof, it is hereby ordered, adjudged and decreed that said decree be and it hereby is reversed and set aside;

that the temporary injunction herein be and it hereby is dissolved; that the Bill of Complaint of Kapiolani Estate, Limited, be and it hereby is dismissed at plaintiff's costs; and that the defendants Mary H. Atcherley, Lyle A. Dickey and Edward M. Watson recover against the Plaintiff, Kapiolani Estate, Limited, their costs herein taxed at $185.78 and have execution therefor.

Dated this 17th day of March, 1913.

(Signed) A. G. M. ROBERTSON,
(Signed) ANTONIO PERRY,
(Signed) JOHN T. DE BOLT,
[SEAL.] *Justices Supreme Court.*

Endorsed: No. 680. Supreme Court of the Territory of Hawaii, Kapiolani Estate, Ltd., Plaintiff, vs. Mary H. Atcherley, et al., Defendants. Decree. Filed March 17, 1913, at 10:30 A. M. J. A. Thompson, Clerk. Thompson, Wilder, Watson & Lymer, 3-11 Campbell Block, Honolulu. Attorneys for Defendants.

172 In the Supreme Court of the Territory of Hawaii, October Term, 1912.

KAPIOLANI ESTATE, LIMITED, Plaintiff,
v.
MARY H. ATCHERLEY, LYLE A. DICKEY, and E. M. WATSON, Defendants.

Bill for Injunction.

Appeal.

The above named plaintiff, Kapiolani Estate, Limited, a corporation, conceiving itself aggrieved by the decision and decree made and entered on the 17th day of March, 1913, in the above entitled cause, does hereby appeal to the Supreme Court of the United States from said decision and decree; and prays that this appeal may be allowed for the reasons specified in the assignment of errors, and that a transcript of the record and proceedings, and papers upon which said decision and decree was made, duly authenticated, excepting that, instead of the evidence at large, a statement of the facts of the case shall be certified by this court, may be sent to the Supreme Court of the United States.

Dated, Honolulu, Territory of Hawaii, March 17th, 1913.

CASTLE & WITHINGTON,
DAVID L. WITHINGTON,
Attorneys for Kapiolani Estate, Limited, Plaintiff.

173 And now, to wit, on the 17th day of March, 1913, it is ordered that the appeal be allowed as prayed for.

A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Service of the within and foregoing appeal and citation, and the receipt of a copy thereof, admitted this 17th day of March, 1913.

THOMPSON, WILDER, WATSON & LYMER,
Attorneys for Defendants.

174 [Endorsed:] Original. No. 680. Supreme Court, Territory of Hawaii. Kapiolani Estate, Limited, plaintiff, vs. Mary H. Atcherley, Lyle A. Dickey, and E. M. Watson, defendants. Appeal. Castle & Withington, Attorneys for Plaintiff. Filed March 17 ,1913, at 10:35 A. M. J. A. Thompson, Clerk.

175 In the Supreme Court of the United States.

KAPIOLANI ESTATE, LIMITED, Appellant,
v.
MARY H. ATCHERLEY, LYLE A. DICKEY, and E. M. WATSON.

Appeal from the Supreme Court of the Territory of Hawaii.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To Mary H. Atcherley, Lyle A. Dickey and E. M. Watson, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the City of Washington, within sixty days from the date of this writ, pursuant to an appeal filed in the Clerk's Office of the Supreme Court of the Territory of Hawaii, in a cause wherein Kapiolani Estate, Limited, is appellant, and you, Mary H. Atcherley, Lyle A. Dickey and E. M. Watson, are appellees, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Witness the Honorable A. G. M. Robertson, Chief Justice of the Supreme Court of the Territory of Hawaii, this 17th day of March, 1913.

A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory of Hawaii.

176 [Endorsed:] Original. No. 680. Supreme Court United States. Kapiolani Estate, Limited, Appellant, vs. Mary H. Atcherley, Lyle A. Dickey, and E. M. Watson. Citation on Appeal. Castle & Withington, Attorneys for Appellant. Filed March 17, 1913, at 10:35 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii.

177 In the Supreme Court of the United States.

KAPIOLANI ESTATE, LIMITED, Appellant,
v.
MARY H. ATCHERLEY, LYLE A. DICKEY, and E. M. WATSON.

Appeal from the Supreme Court of the Territory of Hawaii.

Bond on Appeal.

Know All Men By These Presents: That the Kapiolani Estate, Limited, a corporation, and J. F. Colburn and A. N. Campbell, all of Honolulu, in the City and County of Honolulu, Territory of Hawaii, are held and firmly bound unto Mary H. Atcherley, Lyle A. Dickey and E. M. Watson in the full and just sum of One Thousand Dollars, to be paid to the said Mary H. Atcherley, Lyle A. Dickey and E. M. Watson, their attorneys, executors, administrators or assigns, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 17th day of March, 1913.

Whereas, the above named Kapiolani Estate, Limited, a corporation, has prosecuted an appeal to the Supreme Court of the United States, to reverse the decision and decree this day rendered in the above entitled cause by the Supreme Court of the Territory of Hawaii,

Now, therefore, the condition of this obligation is such that if the above named Kapiolani Estate, Limited, a corporation, shall prosecute said appeal to effect and answer all damages and costs, if it shall fail to make such appeal good, then this obligation shall be void, otherwise the same shall be and remain in full
178 force and effect.

Dated, Honolulu, Territory of Hawaii, March —, 1913.

KAPIOLANI ESTATE,
LIMITED. [SEAL.]
(Signed) By its Vice-President, C. W. ASHFORD.
(Signed) By its Treasurer, JOHN F. COLBURN.
(Signed) JOHN F. COLBURN.
(Signed) A. N. CAMPBELL.

Approved by:
(Signed) A. G. M. ROBERTSON,
[SEAL.] *Chief Justice of the Supreme Court of the Territory of Hawaii.*

Endorsed: Original. No. 680. Supreme Court United States. Kapiolani Estate, Limited, Appellant, vs. Mary H. Atcherley, Lyle A. Dickey and E. M. Watson. Bond on Appeal. Filed March 17, 1913, at 10:35 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii. Castle & Withington, Attorneys for Appellant.

179 In the Supreme Court of the United States.

KAPIOLANI ESTATE, LIMITED, Appellant,
v.
MARY H. ATCHERLEY, LYLE A. DICKEY, and E. M. WATSON.

Appeal from the Supreme Court of the Territory of Hawaii.

Assignment of Errors.

Now comes the Kapiolani Estate, Limited, appellant in the above entitled action, and says that in the record of the proceedings in said action in the Supreme Court of the Territory of Hawaii there is manifest error in this, to wit:

1. That the Supreme Court of the Territory of Hawaii erred in sustaining the defendants' appeal from the decision and decree of the Hon. W. L. Whitney, Judge of the Circuit Court of the First Circuit, Territory of Hawaii, and directing plaintiff's bill to be dismissed.

2. That the said court erred in holding that it was bound by the decision of the Supreme Court of the United States in the case of Lewers & Cooke, Limited, v. Atcherley, 222 U. S. 285, and could not follow its own inclination, overrule the case of Lewers & Cooke, 19 Haw. 47 and 254, and affirm the decision of the circuit judge.

3. That the said court is in error in holding that it is bound to follow an opinion of the Supreme Court of the United States which follows an opinion of the Supreme Court of the Territory of Hawaii, which opinion, in its judgment, is erroneous and should not be followed; and in holding that the former ruling is to be
180 reversed by the Supreme Court of the United States, and not by the Supreme Court of the Territory of Hawaii.

4. That the said court is in error in holding that it was bound to follow the said decision of the Supreme Court of the United States, although the fact that Kinimaka was the guardian of Kalakaua at the time the claim for this land was presented to the Board of Land Commissioners was not included in the findings of fact certified on the appeal in said cause.

5. That the said court erred in failing to hold that the court had a right to follow the law of the case and to affirm the decree of the circuit judge; and in holding that they could not follow the law of the case, which, in their view, is correct, because of the decision of the Supreme Court of the United States in another cause between other parties.

6. That said court erred in failing to hold that the court should follow, and had a right to follow, the decision in this cause by said court on demurrer rendered in 1903, at a time when that court was the court of final resort in said cause and there was no appeal to the Supreme Court of the United States; and in holding that, under such circumstances, the court was bound to follow the deci-

sion of the Supreme Court of the United States in another cause between the parties.

Dated, Honolulu, Territory of Hawaii, March 17th, 1913.

CASTLE & WITHINGTON,
DAVID L. WITHINGTON,
Attorneys for Kapiolani Estate, Limited, Appellant.

181 [Endorsed:] Original. No. 680. Supreme Court United States. Kapiolani Estate, Limited, Appellant, vs. Mary H. Atcherley, Lyle A. Dickey, and E. M. Watson. Assignment of Errors. Castle & Withington, Attorneys for Appellant. Filed March 17, 1913, at 10:35 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii.

182 In the Supreme Court of the Territory of Hawaii, October Term, 1912.

KAPIOLANI ESTATE, LIMITED, Plaintiff,
v.
MARY H. ATCHERLEY, LYLE A. DICKEY and E. M. WATSON, Defendants.

Findings of Fact.

The Chief-ess Kaniu was, prior to 1843 (or 1844), at which time she died, the owner of the land in question in this proceeding, in so far as rights of property in land existed and were recognized at that time. At the time of her death she left no children of her own, but was survived by her husband, Kinimaka, who was of inferior birth; and by David Kalakaua, afterwards King, who was a high chief and who had been adopted by her and lived with her as her child. At the time of her death she made a verbal will, by which she bequeathed all her property to David Kalakaua; and by the same will her husband, Kinimaka, was made the testamentary guardian of the child, to "take charge of the land for him."

On July 14, 1846, Kinimaka applied to the Board of Commissioners to Quiet Land Titles for an award of three parcels of land in Honolulu, claiming to have received one from his wife, Kaniu; another from Kapiiwi, and another (including that here in controversy) from Liliha. The Board on April 10, 1849, awarded him the land, and, after a vote of the Privy Council remitting commutation, a Royal Patent was issued to Kinimaka August 30, 1853, for the land claimed, including that in controversy now known
183 as Lot 1, Land Commission Award 129, Royal Patent 1602.

Exhibit "S" of plaintiff's amended bill contains a true copy of Kinimaka's petition to the Board of Commissioners to Quiet Land Titles, and a true translation thereof; Exhibit "Q" of plaintiff's bill is a true copy of Land Commission Award 129, and a true

translation thereof; and Exhibit "R" of plaintiff's bill is a true copy of Royal Patent 1602, and a true translation thereof.

On December 30, 1856, David Kalakaua, who had come of age on November 16, 1856, brought a suit in equity before the Chief Justice of the Hawaiian Islands Sitting as a Court of Chancery, against Kinimaka, claiming that Kinimaka held title to the land here in controversy and other lands in trust and as his guardian, and praying that Kinimaka might be declared trustee of said land and decreed to convey the same in fee to him. The summons was served on Kinimaka, who died January 24, 1857, without having filed any answer thereto. Exhibit "A" of plaintiff's amended bill is a true copy of the petition in that case, and Exhibit "B" is a true copy of the summons.

Kinimaka left a will, which was duly admitted to probate, and by this will devised certain of his property, including that in controversy here, to his daughter, Kaniu Kinimaka, for life; then to his son, David Leleo Kinimaka, for life; and remainder to his son, Moses Kapaakea Kinimaka, in fee. These three children and their mother, Pai, the second wife of Kinimaka, survived him.

On March 16, 1857, under the title of the original suit, Kalakaua filed a suggestion of the death of Kinimaka and of his leaving as heirs by will his three minor children, Kaniu, David Leleo (father of Mary H. Atcherley) and Moses Kapaakea, and prayed that the heirs be made parties to the bill, that a guardian ad litem be appointed for them, and that a time be set for the further
184 hearing of the cause. The full record is as follows:

In re DAVID KALAKAUA
vs.
KINIMAKA.

To the Hon. G. M. Robertson, Acting Chief Justice and Chancellor of the Hawaiian Islands:

The Orator in the above entitled cause by the Undersigned His Attorney, respectfully suggests to Your Honor, that on or about the 24th day of January last, the above named, Respondent deceased, after service of Your Orator's Petition and before answer filed leaving as heirs by will his three minor children Kaniu, D. Leleo & Moses Kapaakea, which said will has been duly admitted to probate—and Your Orator further suggests that the said heirs are the legal representatives and successors of the Respondent, aforesaid, in the Trust in certain Real Estate charged in the Bill filed in this cause to exist in favor of Your Orator.

Wherefore the said Orator prays that the said heirs may be made parties to the said Bill, and that a guardian and litem may be appointed for them by Your Honorable Court. And that Your Honor will be pleased to appoint a day and hour for the further hearing of this cause.

And Your Orator will ever pray, &c.

JAS. W. MARSH,
Att'y for Kalakaua, Orator.

Honolulu, March 16th, 1857.

On March 8, 1858, David Kalakaua applied in probate for admission to probate of the oral will of Kaniu, first wife of Kinimaka, alleging her death in 1843 leaving all her property to him. This will was admitted to probate. Exhibits D, E, F, G, H and I of plaintiff's amended bill are true copies of the record in said probate proceedings.

On May 5, 1858, Richard Armstrong was appointed guardian of the said minor children of Kinimaka by G. M. Robertson, Associate Justice of the Supreme Court, upon the petition of Pai, their mother. Exhibits O and P of plaintiff's amended bill are true copies of said petition and appointment.

On June 19, 1858, David Kalakaua filed another petition in equity before E. H. Allen, Chief Justice of the Supreme Court of Law and Equity of the Hawaiian Islands against Pai and R. B. Armstrong, Guardian of Kaniu, David Leleo and Kinimaka, minor children of Kinimaka, deceased, alleging that Kaniu, a
185 native chiefess, died at Honolulu about 1843, having declared him to be her heir by her last will; that he was then an infant, having been born November 16, 1836; that Kaniu, at the time of her death, directed her husband, Kinimaka, to manage the property for David Kalakaua's benefit during his infancy; that David Kalakaua, on becoming of age, discovered that Kinimaka, whilst acting as guardian, had procured the award of the land belonging to Kaniu to be wrongfully and fraudulently issued in his (Kinimaka's) own name, and died in January, 1857, without having conveyed the title to Kalakaua; that on May 3, 1858, David Kalakaua proved the will of Kaniu at the Court of Probate held before Associate Justice G. M. Robertson; that the lands bequeathed to him by Kaniu are two houselots in the City of Honolulu, awarded by Land Commission Award 129, confirmed by Royal Patent 1602 (and other lands); that David Kalakaua is grandnephew of Kaniu, and her adopted child; that at the time of the the time of the decease of Kaniu she was competent, by the law and custom of the Kingdom, to make a will, and that her will would pass the property to and vest the same in said David Kalakaua, or to Kinimaka for his use and benefit.

The petition further represented that the procuring of said award in his own name by Kinimaka was contrary to equity and good conscience, and prayed a decree that Kinimaka did, during his lifetime, procure the awards and hold possession of said lands for the use and benefit of David Kalakaua, and that R. B. Armstrong, guardian of the minor children of Kinimaka, be ordered to convey to David Kalakaua all the right, title and interest of said children, and that Pai, widow of Kinimaka, be ordered to convey to Kalakaua all her right, title and interest in said lands.

Exhibit J of plaintiff's amended bill is a full and true copy of said petition.

Upon this petition of David Kalakaua a summons was
186 issued and served upon R. Armstrong by leaving a certified copy of the same with A. B. Bates, and served upon Pai by leaving a certified copy of the same at her usual place of abode

with a member of her family. Exhibit K of plaintiff's amended bill is a true copy of said summons and the return of service thereon.

That the form of the petition, summons and the method of service thereof were in accordance with the usual practice in the Hawaiian Kingdom at the time of the institution of said action in cases in which minors were made parties and jurisdiction obtained over them.

The defendants Pai and Richard Armstrong filed an answer, and proceedings followed in said cause, including the hearing of evidence on the part of the petitioner, argument of counsel, a discontinuance by petitioner as to a part of the land, and a final decree. Exhibits J, K, L, M and N of plaintiff's amended bill are a full and true copy of the records of said cause.

No deed of the land in controversy from said Richard Armstrong as guardian of the minor children of Kinimaka to David Kalakaua is on record, either in court or in the Registry of Deeds in Honolulu.

Since November 2, 1858, David Kalakaua has not been molested in any way by either the widow or heirs of Kinimaka or said Armstrong in their behalf, and he retained open, notorious and undisputed possession of the land in controversy and dealt with it as his own until he disposed of it.

The successors in title of David Kalakaua have retained open, notorious and, until about January 1, 1900, undisputed possession of said property, and in all ways dealt with it as their own.

187 The title of David Kalakaua has passed by deeds as follows:

By a deed from David Kalakaua to Luakini and wife dated March 9, 1868, and recorded in Oahu Registry of Deeds in Book 25 page 332.

By a deed from Luakini and wife to Kapiolani dated April 1, 1868, and recorded in Oahu Registry of Deeds in Book 25 page 336.

By a deed from Kapiolani to David Kawananakoa and Jonah Kalanianaole dated February 10, 1898, and recorded in Oahu Registry of Deeds in Book 176 page 232.

By a deed from David Kawananakoa and Jonah Kalanianaole to E. H. Wodehouse dated July 12, 1898, and recorded in Oahu Registry of Deeds in Book 181 page 294.

By a deed from E. H. Wodehouse to David Kawananakoa and Jonah Kalanianaole dated June 25, 1899, and recorded in Oahu Registry of Deeds in Book 195 page 232.

By deed from David Kawananakoa and Jonah Kalanianaole to Kapiolani Estate, Limited, dated August 7, 1899, and recorded in Oahu Registry of Deeds in Book 194 page 427.

By a deed from Kapiolani Estate, Limited, to David Kawananakoa and Jonah Kalanianaole dated August 30, 1902, and recorded in the Office of the Registrar of Conveyances in Book 241, page 447, of 3525 square feet of said land, which portion is now a part of Punchbowl street, in Honolulu.

By a deed from Kapiolani Estate, Limited, to Lewers & Cooke, Limited, dated May 29, 1905, and recorded in the Office of the Registrar of Conveyances in Book 269 page 231, of a portion of the land in controversy.

By a deed from Carlos A. Long, Trustee for David Kawananakoa and Jonah Kalanianaole, and Kapiolani Estate, Limited,
188 to Lewers & Cooke, Limited, dated May 29, 1905, and recorded in the Office of the Registrar of Conveyances in Book 272 page 85, of the remainder of the land in controversy.

The said deeds from Kapiolani Estate, Limited, to Lewers & Cooke, Limited, were warranty deeds, with full covenants of title, and were made for a consideration of $35,000.

The land described in the last three deeds includes all the land contained in Lot 1, Land Commission Award 129, Royal Patent 1602.

Exhibits A, B and C of the Supplemental Answer of Mary H. Atcherley are true copies of said last three deeds.

The Kapiolani Estate, Limited, is not now in possession of any of the land in controversy, and has not been since May 29, 1905.

Lewers & Cooke, Limited, is in possession of all of the land in controversy, except that which is part of Punchbowl street and so used by the public.

Kaniu, David Leleo and Moses Kapaakea, children of Kinimaka, were at all times well aware that the said David Kalakaua and his successors were in said open, notorious and undisputed possession of said property and dealing with it as their own.

Kaniu Kinimaka became of age about 1867, David Leleo Kinimaka about 1871, and Moses Kapaakea Kinimaka about 1877, and at no time asserted any claim to said lands or denied the rights of David Kalakaua and his successors in title thereto, but at all times acquiesced in the said possession of David Kalakaua and his successors in title.

On May 18, 1897, Moses Kapaakea Kinimaka (his wife, Kamano, joining therein to release her dower) executed and delivered to Mary H. Atcherley a deed of the following tenor:

189 "Know all men by these presents that M. K. Kinimaka of Honokaa Hamakua, Island of Hawaii in consideration of Fifty Dollars to him paid by Mrs. Mary H. Atcherley of Kailua, North Kona Island of Hawaii, the receipt whereof is hereby acknowledged does hereby give, grant, bargain, sell and convey unto the said Mary H. Atcherley her heirs and assigns all of his right, title and interest both real and personal of whatsoever kind nature and description as one of the heirs at law in and to the estate of his father Kinimaka deceased.

To have and to hold the same with all the rights, privileges and appurtenances thereunto belonging unto the said Mary H. Atcherley her heirs executors administrators and assigns forever.

And Kamano his wife in consideration of One Dollar does hereby release and relinquish all rights of dower in and to the aforesaid inheritance.

In witness whereof the said M. K. Kinimaka and Kamano his

wife have hereunto set their hands and seals this 18th day of May 1897.

MOS. KAPAAKEA KINIMAKA.
KAMANO.

which deed was on June 3, 1897, recorded in the Office of the Registrar of Conveyances in Honolulu in Book 167 page 368.

David Leleo Kinimaka died before Kaniu Kinimaka.

Kaniu Kinimaka died January 4, 1901.

On July 31, 1901, Mary H. Atcherley filed an ejectment suit against the Kapiolani Estate, Limited, Lewers & Cooke, Limited, (at that time a tenant of Kapiolani Estate, Limited), and others in the circuit court of the first circuit, Territory of Hawaii, to recover possession of all of the land described in Lot 1, of Land Commission Award 129, Royal Patent 1602, and $5000 damages, claiming title in fee simple by purchase from Moses Kapaakea Kinimaka, who obtained it by devise from Kinimaka, the original patentee.

By amendment made May 24, 1909, the damages claimed in said ejectment suit were made $40,000.

On January 29, 1906, Lewers & Cooke, Limited, one of the defendants in said ejectment case and grantee in the two deeds from Kapiolani Estate, Limited, last referred to in these findings, and set out in full as Exhibits B and C of the Supplemental Answer of Mary H. Atcherley, brought suit in the Court of Land
190 Registration of the Territory of Hawaii to register its title to the land described in said deeds. A decree was entered in said court on September 16, 1907, that Lewers & Cooke, Limited, had a good title entitled to registration. On appeal by Mary H. Atcherley to the Supreme Court of Hawaii, said decree was set aside and decision filed March 5, 1908, holding that Lewers & Cooke, Limited, had no title, legal or equitable, in said land, which decision is printed in Vol. 18, Hawaiian Reports, and is made a part hereof by reference. Lewers & Cooke, Limited, filed a motion for rehearing, and, on consideration thereof, the Supreme Court of Hawaii rendered a decision May 4, 1908, contained in Vol. 19, Hawaiian Reports, pages 47-51, which is made a part hereof by reference. The Supreme Court of Hawaii remitted the said case to the Court of Land Registration for further proceedings, and that court entered a decree dismissing the petition of Lewers & Cooke, Limited, for registration. Lewers & Cooke, Limited, appealed from that decree to the Supreme Court of Hawaii, which modified the decree of the Court of Land Registration and on March 24, 1909, entered a final decree that, the court finding that Lewers & Cooke, Limited, had no legal or equitable title to said land, its petition for registration is denied without prejudice to its right to obtain a registered title to all land not covered by said Lot 1, a true copy of which decree is attached as Exhibit D to the Supplemental Answer of Mary H. Atcherley herein. Lewers & Cooke, Limited, appealed from said decree to the Supreme Court of the United States and filed 28 assignments of error. Exhibit E of the Supplemental Answer

of Mary H. Atcherley is a true copy of said assignment of errors. The Supreme Court of the United States, on December 18, 1911, rendered a decision affirming said decree, which decision is published in Vol. 222, U. S. Reports, page 292. Reference is had
191 to the record in said cause in the Supreme Court of the United States, and it is made a part hereof.

By deed dated December 28, 1907, and recorded January 15, 1909, in the Office of the Registrar of Conveyances in Honolulu in Book 315 page 142, Mary H. Atcherley conveyed to Lyle A. Dickey and Edward M. Watson an undivided half of Lot 1, Land Commission Award 129, Royal Patent 1602.

On or about the month of July, 1909, Mary H. Atcherley was adjudicated a bankrupt by the District Court of the United States for the Territory of Hawaii, and J. Alfred Magoon of Honolulu is now trustee in bankruptcy of her estate.

In the suit of Lewers & Cooke, Limited, referred to in these findings, C. W. Ashford, then vice-president of Kapiolani Estate, Limited, and now its counsel in this case, appeared at the trial in the Court of Land Registration and assisted counsel for Lewers & Cooke, Limited, in the conduct of the case by examining three witnesses, and did this at the request of John F. Colburn, who was the treasurer of Kapiolani Estate, Limited, and the officer of Kapiolani Estate, Limited, who in the regular course of business employed attorneys for it. Said John F. Colburn was a witness on behalf of Lewers & Cooke, Limited, at that trial.

Messrs. Kinney, Marx, Prosser & Anderson, while attorneys for Kapiolani Estate, Limited, in this case, were retained by Kapiolani Estate, Limited, through John F. Colburn, its treasurer, to appear as counsel for Lewers & Cooke, Limited, at two hearings before the Supreme Court of Hawaii subsequent to the final decision, and so appeared, and also, on such retainer, signed the assignment of errors upon appeal from the Supreme Court of Hawaii by Lewers & Cooke, Limited, to the Supreme Court of the United States.
192 The Kapiolani Estate, Limited, was not, however, named as a party to said suit of Lewers & Cooke, Limited, and its counsel took no further part by its direction in the proceedings.

Dated, April 24, 1913.

By the Court:

(Signed) J. A. THOMPSON, *Clerk.*

[Endorsed:] Original. No. 680. Supreme Court, Territory of Hawaii, October Term, 1912. Kapiolani Estate, Limited, plaintiff vs. Mary H. Atcherley, Lyle A. Dickey, and Edward M. Watson, defendants. Findings of Fact. Filed April 24, 1913, at 3:28 P. M. (Sig.) J. A. Thompson, Clerk.

193 In the Supreme Court of the Territory of Hawaii, October Term, 1912.

No. 680.

KAPIOLANI ESTATE, LIMITED, a Corporation, Plaintiff,
vs.
MARY H. ATCHERLEY, LYLE A. DICKEY, AND EDWARD M. WATSON, Defendants.

On Appeal to the Supreme Court of United States.

Clerk's Certificate to Transcript of Record.

TERRITORY OF HAWAII,
City and County of Honolulu, ss:

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify that the foregoing pages numbered from 1 to 76, both inclusive, pages numbered from 97 to 171, both inclusive, pages 177 to 178 both inclusive, are full, true and correct copies of the papers, documents, entries and decrees as the same are on file and of record in my office as Clerk of the said Supreme Court of the Territory of Hawaii in the above entitled cause, the foregoing constituting a transcript of the proceedings and decrees, and instead of the evidence at large, the findings of fact of the case, a true copy whereof is included in the foregoing transcript being pages numbered from 182 to 192 thereof and herewith transmitted to the Supreme Court of the United States on the appeal of Kapiolani Estate, Limited, a corporation, the appellant in the above entitled cause.

194 I do further certify that pages numbered from 77 to 96, both inclusive, is a full, true and correct copy of the original opinion of the Supreme Court of Hawaii, rendered April 7, 1903, and which is now on file in the archives of said Supreme Court in a cause entitled "Kapiolani Estate, Limited, versus Mary H. Atcherley", Equity Number 1246;

I do further certify that the original Appeal of Kapiolani Estate, Limited, to the Supreme Court of the United States, together with and annexed thereto the original Order allowing the appeal and acknowledgment of service of appeal and of the Citation on Appeal, being pages numbered from 172 to 174, both inclusive, the original Citation on Appeal, being pages numbered from 175 to 176, both inclusive are hereto attached and herewith returned.

I lastly certify that the original Assignment of Errors, being pages from 179 to 181, both inclusive of the foregoing transcript is herewith transmitted to the Supreme Court of the United States.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of the Supreme Court of the Territory of Hawaii, at Hono-

lulu, City and County of Honolulu, this 2nd day of May, A. D. 1913.

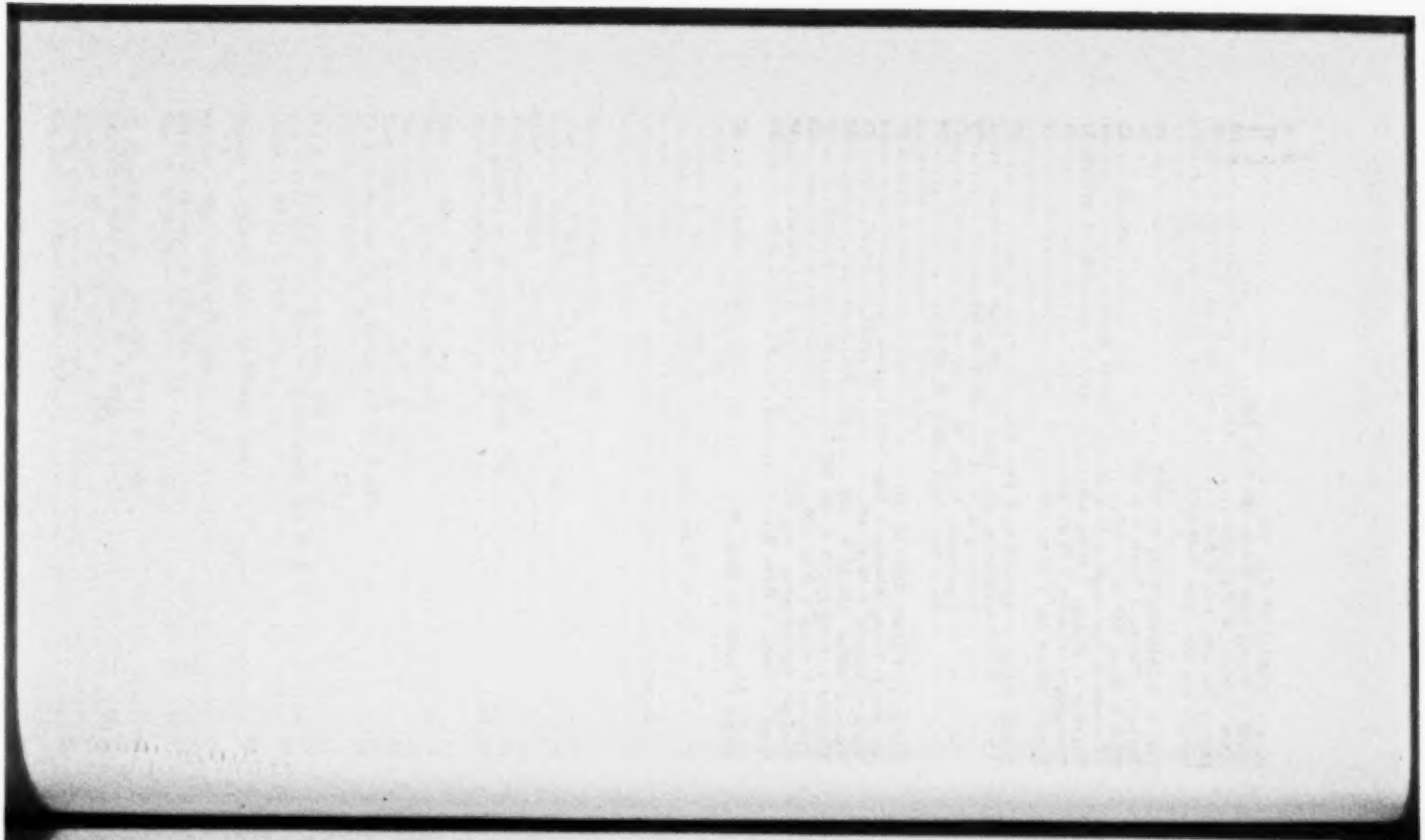
[SEAL.] JAMES A. THOMPSON,
Clerk Supreme Court, Territory of Hawaii.

Endorsed on cover: File No. 23,693. Hawaii Territory Supreme Court. Term No. 174. Kapiolani Estate, Limited, appellant, vs. Mary H. Atcherley, Lyle A. Dickey and E. M. Watson. Filed May 15th, 1913. File No. 23,693.

INDEX.

APPENDIX.

CITATIONS.



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

KAPIOLANI ESTATE, LIMITED,
Appellant,

v.

MARY H. ATCHERLEY, LYLE A. DICKEY and E. M. WATSON,
Appellees.

No. 174

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

Appeal from a decree of the Supreme Court of Hawaii reversing a decree of a circuit judge that the defendants held the legal title to Apana 1 of Land Commission Award 129, Royal Patent 1602 to Kinimaka, as trustees for the plaintiff, directing a conveyance, and enjoining them from maintaining an action at law for the recovery of the land, holding *res adjudicata* between the parties a judgment rendered by the Supreme Court in 1858 upon the ground that Kinimaka, while guardian of Kalakaua, plaintiff's predecessor in title, fraudulently procured the award of Kalakaua's land to be made to himself.

Before setting out the facts in detail, we note that the appeal is taken on the suggestion of the Hawaiian court that its own decree is erroneous, since that decree followed *Lewers & Cooke, Limited, v. Atcherley*, 222 U. S. 285, which case followed a decision of

the Hawaiian court on a matter of local law now held to be erroneous, the court saying:

"The most that we can do now is to respectfully point out wherein, in our judgment, the former opinion was wrong. *This we have done believing it was our duty* to do it, and with this our duty in the premises ends." (Tr., p. 101.)

This case is further peculiar, in that this court in the Lewers & Cooke case did not have before it the fundamental fact on which the plaintiff's case rests, viz., the guardianship, although that fact had been found by the trial court, the Hawaiian court in the case at bar saying:

"Notwithstanding the statement made in the Lewers & Cooke case (19 Haw. 48) that there had been no reversal of the facts found by the court of land registration, *the fact found by that court that Kinimaka 'was the natural guardian of the minor' was not included in the findings of fact certified up by this court on the appeal to the United States supreme court.* And the fact that the guardianship relation existed, vitally important though it was, seems to have received scant consideration in that case. *That Kinimaka was the testamentary guardian of Kalakaua's property seems to be beyond the range of dispute at this time.*" (Tr., p. 95.)

The facts (Finding of Fact, Tr., pp. 111 to 117) are these:

The Chiefess Kaniu was, prior to 1843 (or 1844), at which time she died, the owner of the land in question in this proceeding, in so far as rights of property in land existed and were recognized at that time. These rights had been secured to her at that time by the Declaration of Rights issued by Kamehameha III in 1839, in which it was declared: "Protection is

hereby secured to the persons of all the people, together with their lands, their building lots, and all their property" (Declaration of Rights, p. 10), which declaration was embodied in the Constitution of October 8, 1840.

At the time of her death she left no children of her own, but was survived by her husband, Kinimaka, who was of inferior birth; and by David Kalakaua, afterwards King, who was a high chief and who had been adopted by her and lived with her as her child. At the time of her death she made a verbal will, by which she bequeathed all her property to David Kalakaua; and by the same will her husband, Kinimaka, was made the testamentary guardian of the child, to "take charge of the land for him." This will was duly admitted to probate, after a contest by the heirs of Kinimaka, May 3, 1858 (Tr., pp. 12-18), and the case is reported in *Estate of Kaniu,* 2 Haw. 82.

On July 14, 1846, Kinimaka applied to the Board of Commissioners to Quiet Land Titles for an award of three parcels of land in Honolulu, claiming to have received one from his wife, Kaniu; another from Kapiiwi, and another (including that here in controversy) from Liliha. The Board on April 10, 1849, awarded him the land, and, after a vote of the Privy Council remitting commutation, a Royal Patent was issued to Kinimaka August 30, 1853, for the land claimed, including that in controversy now known as Lot, 1, Land Commission Award 129, Royal Patent 1602. This Board had been created under the Act of December 10, 1845, to Quiet Land Titles, and in the act it was provided that the awards of the Board "shall be binding upon the Minister of the Interior and upon the applicant"; provision was made for an issue of notice to all claimants of land to file their

claims within the period of the existence of the Board, which was limited; the decisions were to be in accordance with the principles established by the Civil Code "in regard to prescription, occupancy, fixtures, native uses in regard to landed tenures * * * primogeniture and rights of adoption," with an appeal to the Supreme Court, and when such appeal shall not have been taken the decision to be final; all claims not presented are deemed invalid and barred; patents are to be issued to the claimants upon payment of a commutation to the Crown for its feudal rights; and "the titles of all lands claimed of the Hawaiian Government * * * shall be deemed to be forever settled, as awarded by said Board."

On December 30, 1856, David Kalakaua, who had come of age on November 16, 1856, brought a suit in equity before the Chief Justice of the Hawaiian Islands Sitting as a Court of Chancery, against Kinimaka, claiming that Kinimaka held title to the land here in controversy and other lands in trust and as his guardian, and praying that Kinimaka might be declared trustee of said land and decreed to convey the same in fee to him. The summons was served on Kinimaka, who died January 24, 1857, without having filed any answer thereto.

Kinimaka left a will, which was duly admitted to probate, and by this will devised certain of his property, including that in controversy here, to his daughter, Kaniu Kinimaka, for life; then to his son, David Leleo Kinimaka, for life; and remainder to his son, Moses Kapaakea Kinimaka, in fee. These three children and their mother, Pai, the second wife of Kinimaka, survived him.

On March 16, 1857, under the title of the original suit, Kalakaua filed a suggestion of the death of

Kinimaka and of his leaving as heirs by will his three minor children, Kaniu, David Leleo (father of Mary H. Atcherley) and Moses Kapaakea, and prayed that the heirs be made parties to the bill, that a guardian ad litem be appointed for them, and that a time be set for the further hearing of the case.

On March 8, 1858, David Kalakaua applied in probate for admission to probate of the oral will of Kaniu, first wife of Kinimaka, alleging her death in 1843 leaving all her property to him. This will was admitted to probate, as before set forth.

On May 5, 1858, Richard Armstrong was appointed guardian of the said minor children of Kinimaka by G. M. Robertson, Associate Justice of the Supreme Court, upon the petition of Pai, their mother.

On June 19, 1858, David Kalakaua filed another petition in equity before E. H. Allen, Chief Justice of the Supreme Court of Law and Equity of the Hawaiian Islands, against Pai and R. B. Armstrong, Guardian of Kaniu, David Leleo and Kinimaka, minor children of Kinimaka, deceased, alleging that Kaniu, a native chiefess, died at Honolulu about 1843, having declared him to be her heir by her last will; that he was then an infant, having been born November 16, 1836; that Kaniu, at the time of her death, directed her husband, Kinimaka, to manage the property for David Kalakaua's benefit during his infancy; that David Kalakaua, on becoming of age, discovered that Kinimaka, whilst acting as guardian, had procured the award of the land belonging to Kaniu to be wrongfully and fraudulently issued in his (Kinimaka's) own name, and died in January, 1857, without having conveyed the title to Kalakaua; that on May 3, 1858, David Kalakaua proved the will of Kaniu at the Court of Probate held

before Associate Justice G. M. Robertson; that the lands bequeathed to him by Kaniu are two houselots in the City of Honolulu, awarded by Land Commission Award 129, confirmed by Royal Patent 1602 (and other lands); that David Kalakaua is grandnephew of Kaniu, and her adopted child; that at the time of the decease of Kaniu she was competent, by the law and custom of the Kingdom, to make a will, and that her will would pass the property to and vest the same in said David Kalakaua, or to Kinimaka for his use and benefit.

The petition further represented that the procuring of said award in his own name by Kinimaka was contrary to equity and good conscience, and prayed a decree that Kinimaka did, during his lifetime, procure the awards and hold possession of said lands for the use and benefit of David Kalakaua, and that R. B. Armstrong, guardian of the minor children of Kinimaka, be ordered to convey to David Kalakaua all the right, title and interest of said children, and that Pai, widow of Kinimaka, be ordered to convey to Kalakaua all her right, title and interest in said lands.

The defendants Pai and Richard Armstrong filed an answer, in which they do not deny that the awards were wrongfully issued to Kinimaka and say they cannot admit or deny whether the title was vested in Kinimaka in trust for Kalakaua, that the awards were issued on testimony which satisfied the land court that Kinimaka was entitled to the award; proceedings followed in said cause, including the hearing of evidence on the part of the petitioner, argument of counsel, a discontinuance by petitioner as to a part of the land, and a final decree.

At the hearing, Mr. Bates, attorney for Pai and

Armstrong, admitted that at the time of making the will the whole property was given to Kalakaua; that at the time of Kaniu's death she said to her husband, Kinimaka, standing by at the time, that she wished him to take charge of all her property which she had willed to David. (Tr., p. 23.) Mr. Harris, for Kalakaua, contended that Kinimaka "was not entitled to an award in his own right, but as the guardian of David Kalakaua under the will of Kaniu he was entitled to an award." (Tr., p. 23.) Mr. Bates contended that "after its having been awarded to Kinimaka no appeal was taken against the award, and they were now estopped." Mr. Harris replied that "Kinimaka having assumed the trusteeship was bound to make it known on every occasion. That David having held a portion of Kaniu's land was possession of the whole." (Tr., p. 26.) The portion of the land which David Kalakaua possessed, and possessed at all times after the death of Kaniu, both before and after the award to Kinimaka, and with the acknowledgment of his right by Kinimaka, were the premises in dispute in this action. (Tr., p. 25.)

No deed of the land in controversy from said Richard Armstrong as guardian of the minor children of Kinimaka to David Kalakaua is on record, either in court or in the Registry of Deeds in Honolulu.

Since November 2, 1858, David Kalakaua has not been molested in any way by either the widow or heirs of Kinimaka or said Armstrong in their behalf, and he retained open, notorious and undisputed possession of the land in controversy and dealt with it as his own until he disposed of it.

The successors in title of David Kalakaua have retained open, notorious and, until about January 1,

1900, undisputed possession of said property, and in all ways dealt with it as their own.

Kaniu, David Leleo and Moses Kapaakea, children of Kinimaka, were at all times well aware that the said David Kalakaua and his successors were in said open, notorious and undisputed possession of said property and dealing with it as their own.

Kaniu Kinimaka became of age about 1867, David Leleo Kinimaka about 1871, and Moses Kapaakea Kinimaka about 1877, and at no time asserted any claim to said lands or denied the rights of David Kalakaua and his successors in title thereto, but at all times acquiesced in the said possession of David Kalakaua and his successors in title.

On May 18, 1897, Moses Kapaakea Kinimaka (his wife, Kamano, joining therein to release her dower) executed and delivered to Mary H. Atcherley a deed of the following tenor:

"Know all men by these presents that M. K. Kinimaka of Honokaa Hamakua, Island of Hawaii in consideration of Fifty Dollars to him paid by Mrs. Mary H. Atcherley of Kailua, North Kona Island of Hawaii, the receipt whereof is hereby acknowledged does hereby give, grant, bargain, sell and convey unto the said Mary H. Atcherley her heirs and assigns all of his right, title and interest both real and personal of whatsoever kind nature and description as one of the heirs at law in and to the estate of his father Kinimaka deceased.

"To have and to hold the same with all the rights, privileges and appurtenances thereunto belonging unto the said Mary H. Atcherley her heirs executors administrators and assigns forever.

"And Kamano his wife in consideration of One Dollar does hereby release and relinquish all rights of dower in and to the aforesaid inheritance.

"In witness whereof the said M. K. Kinimaka and

Kamano his wife have hereunto set their hands and seals this 18th day of May 1897.

MOS. KAPAAKEA KINIMAKA.
KAMANO."

which deed was on June 3, 1897, recorded in the Office of the Registrar of Conveyances in Honolulu in Book 167, page 368.

David Leleo Kinimaka died before Kaniu Kinimaka.

Kaniu Kinimaka died January 4, 1901.

On July 31, 1901, Mary H. Atcherley filed an ejectment suit against the Kapiolani Estate, Limited; Lewers & Cooke, Limited (at that time a tenant of Kapiolani Estate, Limited), and others in the Circuit Court of the First Circuit, Territory of Hawaii, to recover possession of all of the land described in Lot 1, of Land Commission Award 129, Royal Patent 1602, and $5000 damages, claiming title in fee simple by purchase from Moses Kapaakea Kinimaka, who obtained it by devise from Kinimaka, the original patentee.

By amendment made May 24, 1909, the damages claimed in said ejectment were made $40,000.

By stipulation of the parties, in order to determine the question whether the decree of 1858 was *res adjudicata* between the parties, the circuit judge made a *pro forma* ruling sustaining a demurrer to the bill and dismissing it. On appeal, on April 7, 1903, the Supreme Court, after a full argument and after having had the case under advisement for six months, held that the decree of 1858 was not ambiguous: that it directed the conveyance of the minor defendants' interests in the land in dispute to the plaintiff Kalakaua, the predecessor in interest of the Kapiolani Estate, Limited; that there was not a lack of juris-

diction over the parties; that the decree was not void for any reason then advanced; that the attack on the decree was a collateral attack; that it was not a consent decree; and that while the court had power to examine into the propriety of the decree it would not, under the circumstances, do so. (Tr., p. 94.) At the time of the rendition of this judgment there was no appeal to this court.

On May 29, 1905, the Kapiolani Estate, Limited, conveyed the land to Lewers & Cooke, Limited, by warranty deeds, with full covenants of title, for the consideration of $35,000.

January 29, 1906, Lewers & Cooke, Limited, applied to the Court of Land Registration to register its title to the land. A decree was entered on September 16, 1907, that Lewers & Cooke, Limited, had a good title entitled to registration. On appeal by Mary H. Atcherley to the Supreme Court of Hawaii, said decree was set aside. The Supreme Court of Hawaii remitted the case to the Court of Land Registration for further proceedings, and that court entered a decree dismissing the petition of Lewers & Cooke, Limited, for registration. Lewers & Cooke, Limited, appealed from that decree to the Supreme Court of Hawaii, which modified the decree of the Court of Land Registration and on March 24, 1909, entered a final decree that, the court finding that Lewers & Cooke, Limited, had no legal or equitable title to said land, its petition for registration is denied without prejudice to its right to obtain a registered title to all land not covered by said Lot 1. Lewers & Cooke, Limited, appealed from said decree. This court, on December 18, 1911, rendered a decision affirming said decree, which decision is published in Vol. 222, U. S. Reports, p. 292.

By deed dated December 28, 1907, and recorded January 15, 1909, in the Office of the Registrar of Conveyances in Honolulu in Book 315, p. 142, Mary H. Atcherley conveyed to Lyle A. Dickey and Edward M. Watson an undivided half of Lot 1, Land Commission Award 129, Royal Patent 1602.

On or about the month of July, 1909, Mary H. Atcherley was adjudicated a bankrupt by the District Court of the United States for the Territory of Hawaii, and J. Alfred Magoon of Honolulu is now trustee in bankruptcy of her estate. The trustee has never elected to be substituted, or intervene, or appear in any way in this suit or in the ejectment suit.

ERRORS ASSIGNED.

1. There being no error in the decree of Chief Justice Allen in 1858 ordering the conveyance to Kalakaua, since Kinimaka held the land in trust for Kalakaua, having procured the award to himself when it was his duty as guardian to procure the award to Kalakaua, the Supreme Court of Hawaii erred in reversing the decision of the Circuit Court.

2. Having held that there was no error in the decision of Chief Justice Allen and in the decision of the Circuit Court, it was error to reverse that decision, for (a) the Hawaiian court was not bound by a decision of this court following an erroneous decision of the Hawaiian court in an action between third parties; (b) the "vitally important" fact of the guardianship not having been before this court, the former decision does not apply.

3. The Supreme Court of Hawaii erred in not following the decision of 1903, (a) because it is the law of this case, (b) because it was the law of this case, settled at a time when there was no appeal to this

court, and (c) because it is the law of this case, which the Hawaiian court approved, and would have followed, but for the decision of this court in the Lewers & Cooke case.

ARGUMENT.

I.

THE JUDGMENT OF CHIEF JUSTICE ALLEN IN 1858 WAS RIGHT AND SHOULD BE ENFORCED, FOR "A MINOR ON COMING OF AGE COULD OBTAIN RELIEF IN EQUITY AGAINST A GUARDIAN WHO HAD, IN FRAUD OF HIS WARD, PRESENTED A CLAIM AND OBTAINED IN HIS OWN NAME AN AWARD FROM THE LAND COMMISSION OF TITLE TO THE MINOR'S LAND."

(Opinion, Supreme Court of Hawaii, Tr., pp. 97, 98.)

(a) *The exact point was raised and decided in the equity action in* 1858, *it was necessarily involved in the probate proceeding in that year, the decision of the Supreme Court of Hawaii on demurrer in* 1903 *declined to review it, and it is sustained by the present decision.*

The answer in the equity case in 1858, after declining to deny the fraud, states

"It as their belief, that if the awards have wrongfully been issued to the said Kinimaka, the same were issued upon testimony produced to the Board of Commissioners to quiet land titles, which satisfied that Board that the said Kinimaka was entitled to such award." (Tr., p. 21.)

Mr. Harris appeared for the complainants, and Mr. Bates for the defendant.

Mr. Bates

"admitted that the land originally belonged to Kaniu. * * * * That David's natural guardians stood by and made no objection to their being granted to Kinimaka. That after its having been awarded to Kinimaka no appeal was taken against the award, and they were now estopped." (Tr., pp. 25, 26.)

Mr. Harris replied

"That Kinimaka having assumed the trusteeship was bound to make it known on every occasion. That David having held a portion of Kaniu's land was possession of the whole." (Tr., p. 26.)

The exact point was therefore raised and decided in this case.

The probate case of *Estate of Kaniu* was regarded by Mr. Justice Judd as deciding the same question. He says Justice Robertson "practically set aside an award of the Land Commission, of which board he was a member." (*Estate of Kekauluohi,* 6 Haw. 172.) See also *Kalakaua v. Keaweamahi,* 4 Haw. 577, and *Nakookoo v. Noholoa,* 19 Haw. 667.

When this case was before the Supreme Court of Hawaii on demurrer the same counsel appearing for Mrs. Atcherley made this point:

"WHETHER OR NOT KINIMAKA HAD A RIGHT TO APPLY FOR THE AWARD. THERE WAS NO FRAUD FOR WHICH THE AWARD OF THE LAND COMMISSION SHOULD BE SET ASIDE."

"For the Land Commission was a court. Its decisions were analagous to decisions *in rem,* and bound all the world. Notice by publication bound all parties including minors. This decision awarding this land to Kinimaka is not subject to direct or collateral attack as against evidence or impaired by new evidence."

Citing *Kukiiahu v. Gill,* 1 Haw. 54 (90); *Kekiekie v. Dennis,* 1 Haw. 42 (69); *Bishop v. Namakalaa,* 2 Haw. 238; *Keelikolani v. Robinson,* 2 Haw. 522; *Kanaina v. Long,* 3 Haw. 332; *Kahoomana v. Moehonua,* 3 Haw. 635; *Kalakaua v. Keaweamahi,* 4 Haw. 577; *Kaai v. Mahuka,* 5 Haw. 354; *Kenoa v. Meek,* 6 Haw. 63; *Kekauluohi, Estate of,* 6 Haw. 172, and *Thurston v. Bishop,* 7 Haw. 421.

The court declined to review the case, and thus affirmed the decision.

The Hawaiian court in the present decision declares:

"If *A* obtains a valid judgment against *B* and secures the fruits of that judgment, and by reason of *A's* relation to *C, A* is the constructive trustee for *C* of those fruits, *C* may proceed in equity to take them from *A.* The suit of *C* against *A* clearly would not constitute an attack on the judgment against *B,* but would assume and maintain its validity. Such is the case here. The suit before Chief Justice Allen was not an attack on the award of the land commission; it was not an attempt to review the proceedings of the land commission or to correct or set aside the award to Kinimaka. On the contrary, it assumed the correctness of the judgment of the land commission and the validity of the award. It was an entirely new proceeding based upon the assertion that the legal title to the land was vested in Kinimaka and his heirs by and under a valid award issued by the land commission, but that because of the other facts averred, the defendants held as constructive trustees for the benefit of the plaintiff. *Furthermore, the new proceeding sought to assert a right which had accrued to the complainant since the date of the award to Kinimaka, namely, the right of a minor, upon his reaching his majority, to demand of his guardian a full and true report of his acts with reference to the trust property, an honest accounting of all*

thereof, and a conveyance of such of it as stood in the guardian's own name. If Kinimaka had failed to present any claim for this land to the land commission either on behalf of his ward or in his own name no title would have been acquired. *Thurston v. Bishop,* supra. Kalakaua could not have followed the property because it would then have been beyond reach. But having obtained the award, Kinimaka, or those claiming under him, could not be allowed to say that the claim of Kalakaua had been litigated and disapproved by the land commission either on the theory that Kinimaka based his claim on an alleged gift from Liliha or otherwise. Kalakaua's claim to this land as against Kinimaka was not presented to the land commission and, consequently, was never passed upon by that tribunal but that could not be attributed to any fault or neglect on the part of Kalakaua. There is an unmistakable analogy between the right of Kalakaua to the relief sought by him in the suit before Chief Justice Allen and the right of one to an injunction or other relief in equity against a judgment at law fraudulently obtained where the circumstances were such that the fraud could not have been shown in defense of the action. Such a case ordinarily is not regarded as an attack upon the judgment or a review of the proceedings had in the law action, but as the assertion and recognition of a distinct and theretofore unlitigated right. 'The suit in chancery does not draw in question the judgment and proceedings at law or claim a right to revise them. It sets up an equity independent of the judgment which admits the validity of that judgment, but suggests reasons why the party who has obtained it ought not to avail himself of it. It proposes to try a question entirely new, which has not been and could not be litigated at law. It may be brought before the commencement of a suit at law, pending such suit, or after its decision by the highest law tribunal.' *Parker v. Circuit Court,* 12 Wheat. 562, 564. See to the same effect, *Johnson v. Waters,* 111 U. S. 640, 667; *Arrowsmith v. Gleason,* 129 U. S. 86, 101; and *Marshall v. Holmes,* 141 U. S. 589.

"Within these principles, then, the decree of 1858 was not erroneous, but right. We do not impugn, but reaffirm, the doctrine so often announced that the awards of the land commission were final and conclusive if not appealed from within the time allowed by the statute, but we do say that the proceeds of such an award, like the fruits of a judgment at law, may be subjected to the equitable rights of others where those rights, if existing prior to the judgment, were suppressed through fraud committed by him who obtained the award upon one who could not act for himself, or have accrued since. To hold otherwise would be to place awards of the land commission upon a plane higher than that accorded to the most solemn judgments of courts of law acting within unquestioned jurisdiction. There is nothing in the judicial history of these islands which would warrant us in according such a position to the judgments of the land commission. It does not militate against the view here taken that the land commission had jurisdiction to consider equitable as well as legal claims, for the circumstances of this case, which must be admitted to be exceptional, show that notwithstanding the broad powers of the land commission, a case may have occurred where a claim failed of presentation not merely without fault on the part of the one who, being incapable of acting on his own behalf, had the right to have it presented for him, but through the fraud of the one upon whom the law imposed the duty of presenting it on the other's behalf who successfully asserted it in his own name.

"If the decree in *Kalakaua v. Pai and Armstrong* was right it ought to be enforced."

(Tr., pp. 99, 100.)

The opinion reviews all the Hawaiian cases cited in the Lewers & Cooke case. Of these cases, it is enough to say that *Kukiiahu v. Gill,* 1 Haw. 54 (90), is an attempt to show error of law in the award, which could have been corrected on appeal, as "Kalua, the

person from whom Gill first bought, had notice of Kukiiahu's claim before the Commission; entered his claim for the same land; and appeared and contested the case" (1 Haw. 54); and it was also found that Gill had notice. In *Kalakaua v. Keaweamahi,* 4 Haw. 577, and *Kaai v. Mahuka,* 5 Haw. 354, the court found no evidence of the alleged error or fraud, and in each case persons *sui juris* failed in the Land Commission Court to protect their rights when they had opportunity, and in one case there was 32 years' and in the other 30 years' adverse possession, without claim on the part of the plaintiffs. In the case at bar the claim was made by Kalakaua immediately on coming of age, and he had been in possession. In *Estate of Kekauluohi,* 6 Haw. 172, the will was held not proved—which settled that case. The further remarks by Judge Judd are the *dicta* of a single judge in reference to the effect of such a will upon lands which had been presented for confirmation, and the weight of his criticism is discounted by the fact that he joined in the decision of the case of *Kalakaua v. Keaweamahi,* 4 Haw. 571, seven years later, in which *Estate of Kaniu* is cited with approval by the full court, saying: "In that case a verbal will was established in favor of his present Majesty Kalakaua." *Thurston v. Bishop,* 7 Haw. 421, is an action between the Kingdom and one whose guardian had failed to present a claim for a ward, and it was rightly held that, as the act provided that "all claims not presented are deemed invalid and barred," the fact that the guardian did not do his duty did not avail the ward against the government. It might be added that Judge Judd, in *Estate of Kekauluohi,* failed to observe that, in *Estate of Kaniu,* Kalakaua proved the will in order to hold his guardian as a trustee of

the award; whereas, in the instant case, the proving of the will was to give rise to a claim at law to the lands in favor of one in default, who alleged no equitable claim. None of the cases cited deal with an equitable claim against the patentee, excepting as it is claimed to have arisen on the face of the proceedings in *Kaai v. Mahuka.*

(b) *The equity suit before Chief Justice Allen did not seek to set aside the land commission award, but to obtain its fruits.*

It seems to us sufficient, in addition to the citation under (a), to rely under this head on the remaining portion of the decision of the court below upon this point.

"The question now presented is whether a minor on coming of age could obtain relief in equity against a guardian who had, in fraud of his ward, presented a claim and obtained in his own name an award from the land commission of title to the minor's land. This question was neither involved nor discussed in any of those cases.

"The case of the guardian of a minor obtaining an award in his own name of land belonging to his ward is analogous to the case of a guardian who purchases land with money belonging to the ward, and, in violation of his fiduciary duty, intentional or otherwise, takes the title in his own name. In such a case it is well settled, equity, regarding the land as being the property of the ward, will declare and enforce a constructive trust in favor of the ward and order the conveyance of the legal title. 3 Pom. Eq. Jur., Secs. 1052, 1058.

"Where, as was shown in the case of *Kalakaua v. Pai and Armstrong,* an award of land had been obtained by the guardian during the ward's minority, and the ward had asserted his right without delay after coming of age by instituting suit against the guardian and, upon his death, his widow and de-

visees, the appropriate relief, if complainant was entitled to relief, undoubtedly would be a declaration of trust and an order to convey the legal title. The bill of complaint in that case alleged the death, testate, of Kaniu in 1843; the devise to the complainant who at that time was an infant; the designation of Kinimaka as testamentary guardian of the property of the complainant; the discovery, on complainant's coming of age, that his guardian had fraudulently procured certain awards of lands in his own name; the admission of Kaniu's will to probate; the title to the lands in Kinimaka in trust for the use and benefit of the complainant; the death of Kinimaka in 1857, leaving a widow and three children; and that the procuring of said awards by Kinimaka in his own name was contrary to equity and good conscience. The complainant prayed for a decree declaring that Kinimaka procured the awards and held possession of the lands for the use and benefit of the complainant; that the widow and the guardian of the children be ordered to convey all their right, title and interest in said lands to the complainant; and for further relief. * * * The upholding of the award was essential to the success of Kalakaua's suit. To attack and set aside the award would have been to take from Kinimaka's representatives the very title which the complainant was seeking to compel them to convey to him." (Tr., pp. 97, 98.)

(c) *The jurisdiction had been expressly granted to the Supreme Court by statute before* 1858.

Under the Constitution, the judicial power extended to all cases in Law and Equity (Constitution of 1852, Art. 84); and the Chief Justice was the Chancellor of the Kingdom and exercised jurisdiction in equity, subject to appeal to the full court (Art. 86).

Under the original act organizing the judiciary department in the Hawaiian Islands,

"The reasonings and analogies of the common law,

and of the civil law, may in like manner be cited and adopted by any such court, so far as they are deemed to be founded in justice, and not a conflict with the laws and usages of this kingdom."

Third Act Kamehameha III, Chapter I, Section IV (1847) (Appendix).

By the same Act, Chapter IV, Article III, Section VIII, the Chief Justice, subject to appeal to the court, had

"power at chambers, *to entertain bills in equity for the discovery of fraud,* or of facts important to any complainant; and *to enforce, by bill and decree in equity, hypothetical rights of property;* * * * to relax the strict rules of law applicable to any case, *or to enlarge or restrain the meaning of the law, when the strict application thereof would work injustice to a party.*"

"Said chief justice shall have all the equity powers incident at common law to the office of Chancellor." (Section IX.)

"They shall have full powers to compel executors, administrators and *guardians* to the performance of their trusts." (Section XVIII.) (Appendix.)

By the Act of May 26, 1853, organizing the judiciary, passed after the adoption of the Constitution of 1852, by Section 2, jurisdiction is granted to the Supreme Court in law and equity, with all the powers, legal and equitable, of the present court; by Section 4 the Chief Justice was given jurisdiction in chambers as Chancellor in equity; by Section 5 the Supreme Court was given jurisdiction over inferior tribunals, where no other remedy provided. (Appendix.)

(d) *The court, before* 1858, *had declared its jurisdiction in plain terms.*

In 1847 a lease made to defeat an existing judgment was held fraudulent and void, the court saying of this rule:

"It is a rule of law, founded in integrity and fair dealing between man and man; a rule of law based on the great principles of morality and public policy."
Wood v. Stark, 1 Haw. 9 (9).

In 1853, where a conveyance had been made with the intent to defeat a judgment, it is said by Chief Justice Lee:

"The sale is void; for the purpose is iniquitous. The law will not allow one man to assist another in cheating a third."
Cockett v. Hubbard, 1 Haw. 101 (174).

So in 1855, where a sale was made under fraudulent representations:
Alo v. Blair, 1 Haw. 153 (269).
In 1855, in an action to reach property to apply on an execution:

"If courts of law, from any defect of power, are unable to afford an adequate remedy for that purpose, then we must turn to the court of chancery, and look for aid from thence. In the emphatic language of Woodworth, J., in the case of *Hadden v. Spader,* 20 Johnson 562, 'It would be matter of surprise as well as regret, if in a system of jurisprudence that has been matured by the wisdom of ages, *adequate remedies were not provided for the violation of every important civil right.*'
"Lord Redesdale observed, in *Bond v. Hopkins* (1 Sch. & Lef. 420), 'Nothing is better settled in Courts of Equity, than that, where a title exists at law, and in conscience, and the effectual assertion of it at law is unconscientiously obstructed, relief should be given in equity; *and that when a title exists in con-*

science, though there be none at law, relief should also, though in a different mode, be given in equity.'"
Dana v. Angel, 1 Haw. 196 (347).

In 1856 an administrator, who purchased through a third person assets of the estate, was held to be a trustee, the court saying:

"I do not think the confirmation of the sale by the court of much weight, so far as the interests and rights of the heirs at law are concerned, inasmuch as they were at that time *unrepresented here, except by the administrator himself.* (p. 267.)

But holding, apart from this, as a matter of law:

"The administrator is to be regarded in the light of a trustee for all the parties interested, and as such he could not be permitted, while selling property for the benefit of others, to become himself the purchaser. I do not say that where the administrator becomes interested in the purchase, this renders the sale absolutely null and void, but that in every such case the *cestui qui trust,* may, unless he has subsequently, with full knowledge of the facts, acquiesced in such sale, come into court within a reasonable time, and ask that it be set aside, and the property re-exposed to sale, under the direction of the court. If a trustee will purchase, he does so subject to this equity of the *cestui qui trust.* (p. 267.)

"The rule which strikes at the root of the evil, has its foundation in sound policy, and is calculated to guard against the hazard of abuse, by removing the trustee from the temptation to make a gain to himself from his fiduciary capacity." (p. 268.)
Estate of Turner, 1 Haw. 266, 267, 268 (476).

In 1856 in *Williams v. Kaea,* 1 Haw. 236 (423), a deed of conveyance, absolute on its face, but for a consideration much below the true value, was held in

favor of creditors to be a mortgage, although the proof did not sustain the allegation that it was made for the purpose of evading the claims of creditors.

(e) *And has since consistently maintained such construction of its jurisdiction.*

In 1859 it was assumed that a bill would lie to set aside a Royal Patent on the ground that the widow, to whom it was issued, was an administratrix and the natural guardian of a minor child of the awardee. The bill was dismissed on the ground that a contract made by a guardian appointed by the court before award to the deceased husband that the land should be set aside as dower to the widow constituted an equity which could be enforced as against the award, and that the patent was properly issued to the widow.

Laanui v. Puohu, 2 Haw. 161.

In 1860 Mr. Justice Allen held, in reference to a sale between parties in a relation of confidence:

"For if a man is acting in a fiduciary capacity, and makes a contract greatly to his advantage, the law would regard it as fraudulent, unless it appeared that both principal and agent equally understood the nature and circumstances of the contract; for the agent must not conceal any facts within his knowledge which might influence his principal as to price or value. The question does not turn upon the point of intention, but upon the obligation, from the fiduciary relation of the parties, to make a frank and full disclosure. (1 Story's Equity Jurisprudence, 344; *Farmer v. Brooks,* 9 Pick. Rep. 42.)"

"Whenever a person has held a situation of confidence, and has acquired information respecting the value of the subject of the contract, and what he has not imparted to his *cestui que trust,* and uses it to his advantage, it is sufficient ground for the interfer-

ence of equity in cases when if no such confidence had been reposed equitable relief could not be given."
Kapaakea v. Morrison, 2 Haw. 272, 277, 285.

In 1860, Mr. Justice Robertson, discussing the jurisdiction of a court of equity, said:

"Courts of Equity do sit to enforce, in many cases, the observance of a legal or technical morality between parties who assume towards each other those relations which peculiarly demand the exercise of mutual good faith."
Montgomery v. Coady, 2 Haw. 322, 329.

Chief Justice Allen, in 1862, in a case involving a resulting trust, quotes Chancellor Kent, that a trust is merely what a use was before statute of uses. "It is an interest resting in conscience and equity," and in exercising its jurisdiction the "court of chancery is not bound by the technical rules of law, but takes a wider range in favor of the interest of the party."
Montgomery v. Montgomery, 2 Haw. 553.

In 1869 in a case where the deed was set aside, undue advantage having been taken of a position of trust, Mr. Justice Hartwell says:

"Violations of trust, and undue advantage taken of credulity and ignorance, furnish the groundwork of a large number of cases in which equity relieves."
Ainini v. Kala, 6 Haw. 16, 18.

Many of these cases are reviewed by Mr. Justice Hartwell in a case decided in 1871, in which he says:

"In addition to the decisions above referred to, the remarks of the Court in two recent English Chancery cases will serve to define the rule which must be applied when, as in this case, special advantage is obtained by one occupying a position of trust. 'The

jurisdiction exercised by Courts of Chancery over the dealings of persons standing in certain fiduciary relations has always been regarded as one of the most salutary description. Whenever two persons stand in such a relation, that while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage.' Per Chelmsford, Ld. Ch., in *Tate v. Williamson,* 2 Ch. 61, 1866. 'I take it to be a well-established principle of this Court, that persons standing in a confidential relation towards others can not entitle themselves to hold benefits which those others may have conferred upon them unless they can show to the satisfaction of the Court that the persons, by whom the benefits have been conferred, had competent and independent advice in conferring them.' Per Turner, J., in *Rhodes v. Bate,* 1 Ch. 257, 1866."

Kapea v. Moehonua, 6 Haw. 49, 51.

In 1871, in an action in ejectment, the plaintiff sought to set aside a patent issued to a third party on an award to plaintiff; but the court held:

"* * * that in order to set aside a patent for mistake, fraud, or other reason, application must be made to a Court of Equity."

Davis v. Brewer, 3 Haw. 270, 273.

Thereupon, in 1872, a bill in equity was brought by Davis, in which it was sought to set aside, not only the patent, but a judgment upon which it had been obtained; the court saying:

"When an allegation is made that there was a fraud on the absentee whose rights were thus apparently adjudicated, a person may show if he can that

the apparent fraud was real, *without impeaching the validity or conclusiveness of the judgment within the meaning of the above rule,* for, as Lord Coke says, fraud is something which 'vitiates the most solemn judicial proceedings, ecclesiastical or temporal.' "

Davis v. Brewer, 3 Haw. 359, 363.

In 1873 Chief Justice Allen held that equity had jurisdiction to set aside erroneous distribution in a probate court.

Wei See v. Young Sheong, 3 Haw. 489.

"The general rule is that equity may relieve against every species of fraud and so may set aside or annul decrees or judgments obtained through fraud."

Akeau v. Iakona, 13 Haw. 216.

Judgments have been frequently set aside for fraud.

Norris v. Herblay, 9 Haw. 514.
Mills v. Briggs, 4 Haw. 506.
See Hop v. Parke, 6 Haw. 688.
Hackfeld v. Bal, 6 Haw. 364.

We have reviewed the Hawaiian statutes and decisions at this length to show that what this court calls "the refined rules of the English Chancery concerning fiduciary relations" (*Lewers & Cooke v. Atcherley* ubi supra) were an integral and binding part of Hawaiian law.

(f) *This is in accord with the decisions of this court.*

"If one takes a title in his own name, whilst acting as agent, trustee or guardian, or in any other fiduciary capacity, a court of equity will, upon a showing of the fact in an appropriate proceeding, subject the

lands to proper trusts in his hands or compel him to transfer the title to the party equitably entitled to it."

Sanford v. Sanford, 139 U. S. 642, 35 L. Ed. 290, 291.
Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485.
White v. Cannon, 6 Wall. 443, 18 L. Ed. 923.
Stark v. Starr, 6 Wall. 402, 419, 18 L. Ed. 925.
Ringo v. Binns, 10 Pet. 269, 9 L. Ed. 420.

These are cases of patents issued by the proper authority; but the same principle applies in any case where there has been a decision made by any tribunal whatsoever.

United States v. Arredondo, 6 Pet. 691, 8 L. Ed. 547.
United States v. California, etc., Land Co., 148 U. S. 30, 37 L. Ed. 354.

"In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it. Story, Eq. Jur., secs. 1570-1573; Kerr, Fraud and Mistake, 352-353. This subject was discussed in *Gaines v. Fuentes,* 92 U. S. 10 (XXIII, 524), and *Barrow v. Hunton,* 99 U. S. 80 (XXV, 407)."

Johnson v. Waters, 111 U. S. 640, 28 L. Ed. 547, 556.

The guardian is a trustee *ex malificio* in respect to that property.

Angle v. Chicago, St. P., M. & O. R. Co., 151 U. S. 1, 38 L. Ed. 55.

Felix v. Patrick, 145 U. S. 317, 36 L. Ed. 719.
National Bank v. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693.
Cook v. Tullis, 18 Wall. 332, 21 L. Ed. 933, 938.

(g) *The acts in regard to Mexican land grants in California provided for a decree and patent of similar conclusive effect to a land commission award in Hawaii, and this court has repeatedly held that trust relations are not affected.*

"Every question which could arise on the title claimed could come to and receive judgment from this court. The scheme of adjudication was made complete, and all the purposes of an act to give repose to titles were accomplished. And it was certainly the purpose of the act of 1851 to give repose to titles. * * * The jurisdiction of the board was necessarily commensurate with the purposes of its creation, and it was a jurisdiction to decide rightly or wrongly. If wrongly, a corrective was afforded, as we have said, by an appeal by the claimant or by the United States to the district court."

Thompson v. Los Angeles F. & M. Co., 180 U. S. 72, 45 L. Ed. 432, 435.

The exception under that act of the claims of third parties includes only those who could resist the action of the government, and such a person must have presented his claim and obtained an award.

Botiller v. Dominguez, 130 U. S. 238, 32 L. Ed. 926.
Knight v. United Land Ass'n, 142 U. S. 161, 35 L. Ed. 974.
More v. Steinbach, 127 U. S. 70, 32 L. Ed. 51,
Ainsa v. New Mexico & A. R. Co., 175 U. S 76, 44 L. Ed. 78.
Barker v. Harvey, 181 U. S. 481, 45 L. Ed. 963.

Such is the rule under the act in question.

Thurston v. Bishop, 7 Haw. 421.

Rose v. Yoshimura, 11 Haw. 30.

Kenoa v. Meek, 6 Haw. 63.

Kekiekie v. Dennis, 1 Haw. 69 (42).

But the confirmation did not affect trust relations between the confirmee and his *cestui que trust.*

More v. Steinbach, ubi supra.

"Nor is there anything in the Act of March 3d, 1851, *which changes the nature of estates in land held by individuals or towns.* * * * By proceedings under that Act, imperfect rights—mere equitable claims—might be converted by the decrees of the Board or courts, and the patent of the government following, into legal titles; *but whether the legal title thus secured to the patentee was to be held by him, charged with any trust, was not a matter upon which either Board or court was called upon to pass. If the claim was held subject to any trust, before presentation to the Board, the trust was not discharged by the confirmation and the subsequent patent. The confirmation only inures to the benefit of the confirmee so far as the legal title is concerned. It establishes the legal title in him, but it does not determine the equitable relations between him and third parties.* It is true, if a claim were presented by one designating himself as trustee, executor or guardian, or if such relation of the claimant to others appeared in the examination of the case before the Board or courts, the decree might declare that the confirmation was to the claimant in such fiduciary character. *But if the trust was not stated, and did not appear, the legal title was none the less subject to the same trust in the hands of the claimant."*

Townsend v. Greeley, 5 Wall. 335, 18 L. Ed. 547, 549.

Carpentier v. Montgomery, 13 Wall. 480, 20 L. Ed. 698.

The only distinction between the California act and the Hawaiian act is that under the California act all patents rank as though issued at the same time; while Land Commission Awards in Hawaii rank in order of their priority. As we shall show hereafter, rights of third parties stand alike under each.

II.

THE DECREE IN 1858 IS BASED ON THE OWNERSHIP OF THE PROPERTY BY KALAKAUA, A MINOR; THAT KINIMAKA WAS HIS GUARDIAN, OWING HIM THE DUTY TO PRESENT THE LAND FOR AWARD TO THE LAND COMMISSION; THE PRESENTATION AND OBTAINING THE AWARD TO HIMSELF; THE MINOR'S COMING OF AGE, AND THE OBLIGATION OF THE GUARDIAN TO ACCOUNT. IN OTHER WORDS, IT WAS AN EQUITABLE ACTION BY A MINOR AGAINST HIS GUARDIAN FOR AN ACCOUNTING UPON COMING OF AGE.

(a) *Kalakaua was the undoubted owner of the property.*

This is settled by the findings of the court (Tr., pp. 111, 112); the decision in the probate case, which is *res adjudicata* between the parties; was admitted in the action of 1858 (Tr., pp. 22, 25), and was "a right which, in the darkest days of the feudal system, was held sacred by the King." *Keelikolani v. Robinson,* 2 Haw. 522, 529.

"The people's lands were secured to them by the Constitution and laws of the Kingdom, and no power can convey them away, not even that of royalty itself."

Kekiekie v. Dennis, 1 Haw. 42 (69).

(b) *Kinimaka was the guardian of Kalakaua.*

"Kinimaka was made the testamentary guardian of the child, to 'take charge of the land for him.'" (Findings of Fact, Tr., p. 111.)

Kinimaka was doubly Kalakaua's guardian—being a foster parent; as well as by the will of Kaniu. It is provided (Second Act, Kamehameha III, Part I, Chapter IV, Article I, Section VII), in relation to a father and his children:

"He shall be the natural guardian of their persons and of their property." (Compilation of 1846, p. 60.)

And by the Second Act Kamehameha III, Part IV, Chapter I, Section IV:

"It shall be competent to any parent legally entitled to the custody, care and education of a child to bequeath such right to some guardian to be appointed and named in his will. * * * The guardian of a child, by will, shall be the guardian of his person, his property, and of his moral and intellectual training. Such guardian shall stand at law in the place and stead of a child's father, and be answerable in like manner." (p. 199.)

And by the Blue Laws of 1842, Chapter XXI, Section 7 (Thurston's Fundamental Law, p. 73):

"If a child be left without natural parents on account of their death or absence, then the foster parents shall have the direction of the child."

The decree in *re Kaniu,* admitting the will to probate, which appoined Kinimaka as guardian, is *res adjudicata* of that fact between the parties in this

action since their privies were parties to that proceeding and contested the point.

Keliipelapela v. Pamano, 1 Haw. 280 (503).
Nakookoo v. Noholoa, ubi supra.

(c) *Kinimaka as guardian had absolute control and management of the ward's property, with the power of disposition.*

At the time of making this Award, April 10, 1849, a guardian had absolute control and management of the ward's property, with power to dispose of the same without any order of court.

Kamehameha v. Kahookano, 2 Haw. 118.
Laanui v. Puohu, ubi supra.

He could grant a right of way or make any conveyance whatever.

Kamehameha v. Kahookano, ubi supra.

He could assign lands to the widow.

Laanui v. Puohu, ubi supra.

(d) *It was his duty to present the land to the Land Commission for award.*

It was his duty to present the ward's claim to the Board of Land Commissioners.

The acts of the guardian "bound his infant ward in respect to claims before the Land Commission as fully and conclusively as if they had been done" by the minor of full age.

Thurston v. Bishop, ubi supra.

(e) *His failure to present the land forfeited Kalakaua's right.*

The failure of the guardian to present a claim barred the infant's claim.

Thurston v. Bishop, ubi supra.

(f) *A guardian is not allowed to set up title against his ward.*

This has been held in Hawaii in an action of ejectment.

"Keawe having entered upon this land as guardian of the plaintiffs, neither he nor his grantee will be allowed to set up possession or title in themselves adverse to the *cestui que trust,* the wards of Keawe. See Perry on Trusts, Sec. 863."

He

"could not be permitted to show that he had one, at least until he had surrendered his guardianship and the possession of the estate to his wards and put himself thereafter in a hostile position to them."

Lono v. Phillips, 5 Haw. 357, 358, 359.

(g) *The guardian is under an equitable obligation to account.*

Testamentary guardianship, sometimes called statutory guardianship, began with the statute of 12 Car. 2, cap. 24, subs. viii-ix. But the jurisdiction of courts of chancery, a prerogative of the Crown arising from its general duty as *parens patriae,* is a branch of its original jurisdiction.

N. Y. Life Ins. Co. v. Bangs, 103 U. S. 435; 26 L. Ed. 580.

21 Cyc. 166.

It is the duty of courts to protect minors.

Coulson v. Walton, 9 Pet. 62, 9 L. Ed. 51.

Dexter v. Hall, 15 Wall. 9, 21 L. Ed. 73.

White v. Miller, 158 U. S. 128, 39 L. Ed. 921.

This duty was specifically imposed by statute. The court not only had power "to entertain bills in equity

for the discovery of fraud * * * to enforce, by bill and decree in equity, hypothetical rights of property," with all the equity powers incident to the office of chancellor, but it was given *"full powers to compel * * * guardians to the performance of their trusts"* (*ubi supra*).

That Kalakaua's right was not a perfect title, but only a recognized claim, is immaterial. A possessory right which an administrator had not accounted for, but had acquired with another who was apprised of the truth, was decreed to be held by them as trustees.

"The responsibility of trustees does not depend upon the validity of the title of the grantor of the trust property. If the right or interest transferred to them can be sold for a valuable consideration, it is to be treated as property; and corresponding duties devolve upon the trustees with respect to its sale as upon the sale of property, the title of which is undisputed."

Griffith v. Gody, 113 U. S. 89, 28 L. Ed. 934, 937.

Of trustees, one of whom was guardian of the minor, this court said:

"It is a well-settled principle of equity, that wherever a trustee, or one standing in a fiduciary character, deals with the trust estate for his own personal profit, he shall account to the *cestui que trust* for all the gain which he has made. If he uses the trust money in speculations, dangerous though profitable, the risk will be his own, but the profit will inure to the *cestui que trust.* Such a rule, though rigid, is necessary to prevent malversation. (See *Docker v. Somes,* 2 My. & K. 655.)"

Barney v. Saunders, 16 How. 535; 14 L. Ed. 1047, 1051.

Lamar v. Micou, 112 U. S. 452, 28 L. Ed. 751.
Colt v. Colt, 111 U. S. 566, 28 L. Ed. 520.
Hoyt v. Sprague, 103 U. S. 613, 26 L. Ed. 585.

(h) *The ward in the accounting can elect to take the property.*

The claim of counsel for Mrs. Atcherley is that under the Blue Laws of 1842, Chapter 3, Section 14, the only remedy which Kalakaua had was at law for two-thirds of the income for four successive years, and "then the land shall belong to the new landlord." That act has no application, for it related to landlords and tenants, that is to say, Kuleanas, and had no application to a building or town lot such as this is. (*Keelikolani v. Robinson,* ubi supra; *Kanaina v. Long,* 3 Haw. 332.)

A further reason is that Kalakaua was never deprived of the land. When Kinimaka was on the land his only claim to hold it was as guardian of Kalakaua. (Testimony of Kanaina, Tr., p. 23; Kahina, Tr., p. 25.)

If any act applies, it is that of April 23, 1841, Chapter XX (Thurston, p. 71, and appendix), respecting property in trust, that under this Kalakaua could only recover if damaged, and he had never been deprived of the possession.

Even if Kalakaua had an action for damages, he could elect to take the property.

"He has a right to hold his guardian accountable for the balance due him, and repudiate the contract made for his use. Or he may elect to take the land bargained for."

Yerger v. Jones, 16 How. 30; 14 L. Ed. 832, 835.

This court, speaking through Justice Story, where

a trustee had unlawfully converted trust property and repurchased it, held that the *cestui que trust* could, at his option, either hold the original property subject to the trust, or take the substituted property in which it had been invested; saying:

"The rule in equity is, that all the gain made by the trustee, by a wrongful appropriation of the trust fund, shall go to the *cestui que trust.* * * *

"It is to aid in the maintenance of right and in the suppression of meditated wrong."

Oliver v. Piatt, 3 How. 333; 11 L. Ed. 622, 653.

"If the trust property comes back into the hands of the trustee, that fact does not affect the rights of the *cestui que trust.* The cardinal principle is that the wrong-doer shall derive no benefit from his wrong. The entire profits belong to the *cestui que trust,* and equity will so mold and apply the remedy as to give them to him."

May v. Le Claire, 11 Wall. 217; 20 L. Ed. 50, 55.

Even at law a *cestui que trust* has the right to elect to waive the tort and sue in assumpsit.

"The interposition of equity is not necessary where a trust fund is perverted. The *cestui que trust* can follow it at law as far as it can be traced. *May v. Le Claire,* 11 Wall. 217 (78 U. S., XX, 50); *Taylor v. Plumer,* 3 Maule & S. 562."

United States v. State Nat. Bank, 96 U. S. 30; 24 L. Ed. 647, 648.

The election is with the *cestui que trust,* and does not concern the trustee or a third party.

Duncan v. Jaudon, 15 Wall. 165, 21 L. Ed. 142.

This rule is not a refined rule of the English Chancery. It is a fundamental concept of justice, old as recorded law. It applies not only to the relation of

guardian to ward, but of parent to child. Its substance is found in the Code of Hammurabi, Section 177 (Harper's Ed.); in the civil law, under which, when the father's administration ceases, he is accountable for the property of his minor child's estate (*Cleveland v. Sprowl* (1845), 12 Rob. (Law) 172; *Darlington v. Turner,* 202 U. S. 231); and in the common law (Blackstone, Vol. I, p. 461, citing Co. Litt., 88).

When the principle was departed from, under the feudal system, and the guardian allowed to make a profit out of his ward's estate, the evil was gradually modified by statute, and finally wiped out by the statute of 12 Charles II, drawn by Lord Chief Justice Hale. (*Eyre v. Shaftsbury,* 2 P. Wms. 103, 24 Eng. Reprint 659.)

III.

THE RIGHT OF THE WARD IS A CONTRACTUAL OR QUASI-CONTRACTUAL RIGHT AGAINST THE GUARDIAN, WHICH RIGHTS ARE NOT AFFECTED BY A LAND COMMISSION AWARD.

Under the Roman law and the common law the liability of a guardian was considered quasi-contractual.

> Justinian, Book III, Title XXVII, quoted in Scott's Cases on Quasi-Contracts, p. 1.
>
> Henry of Bracton: Laws and Customs of England, Book III, Fol. 100, par. 10. (Scott, p. 4.)

But, whether contractual or quasi-contractual, the ward has a personal action against the guardian, and this right of action is not affected by the Land Commission Award.

The Robinson case is twice reported. Keelikolani claimed by inheritance from Kalaimoku, who had given Robinson in 1827 an agreement for the occupancy of the King's wharf, for which a Land Commission Award had issued to Robinson subject to this agreement. On demurrer it was held that title was not involved, nor could the title of Kalaimoku be disputed until an eviction had taken place by the government, when Robinson claimed to be the owner, since the reversionary interest had never been presented for award.

Keelikolani v. Robinson, 2 Haw. 514.

On the second appeal, in answer to the claim that the heirs of Kalaimoku were barred of their right because they had not obtained an award from the Land Commissioners, the court said:

"If the respondent is bound to account to the present complainant, it is not by reason of privity of estate between them, but by reason of privity of contract, under the agreement of 1827."

Keelikolani v. Robinson, 2 Haw. 549.

In the Laanui case the agreement with the guardian was made May 26, 1851. The award was made to Laanui, then deceased, January 3, 1854, and the patent issued to Puohu August 5, 1856, and it was said that this "was carrying out the purpose of the award to convey to the assigns of the original claimant."

"But, supposing the assignment was not sufficient in point of law to convey the lands, *it would form a title in equity sufficient to repel the complainant's claim. It would authorize a Court to decree a con-*

veyance of the legal estate from the heirs of Laanui, if the legal estate were in them."

Laanui v. Puohu, ubi supra.

Award April 1, 1850, to Kalamau, who had deeded to John Meek February 26, 1850, which deed was not recorded; *held,* the title inured to Meek.

Kaaihue v. Crabbe, 3 Haw. 768.

A right of way is not destroyed by an award which does not refer to it. A right of way is said to be not a title to the soil, but a right to pass over it. An equitable right is not a title to the soil.

Jones v. Meek, 2 Haw. 9.

IV.

THIS COURT SHOULD REVERSE THE JUDGMENT IN ACCORDANCE WITH FAMILIAR RULES OF EQUITY.

(a) *It should follow the law of the case decided by the Supreme Court of Hawaii when it was the court of last resort.*

The decision of the Supreme Court of Hawaii in 1903 was upon a demurrer testing every question which can be raised here under a stipulation (Tr., p. 2), reciting:

"Whereas it is the desire of both Counsel for Plaintiff and Defendant herein that the question of *res judicata* under the proceedings in equity set up in Plaintiff's bill of complaint herein be first adjudicated and settled, thereby *determining whether further litigation between the parties hereto is necessary or not.*"

The precise point relied on was raised and argued at great length, and under the rule of this Court,

which is the law of Hawaii, that decision became the law of this case.

The decision was rendered before the Act of March 3, 1905, authorized appeals to this court.

It is true that where the opinion of an intermediate court is reviewable but not appealable at the time, it can be reviewed on an appeal from a second decision by that court.

Galigher v. Jones, 129 U. S. 193, 32 L. Ed. 658.
United States v. Denver & R. G. R. Co., 191 U. S. 84, 48 L. Ed. 106.

But where the ruling at the time became final, either because the court was the highest court at the time or because the party waived the right of appeal, it is conclusive on all courts at any stage of the case.

"The case was once before the Supreme Court of Texas on an appeal taken to set aside the verdict rendered on a formr trial; and that court held, under the same evidence used at the trial in the circuit court, that the document was admissible in evidence as an ancient one. If the action had originally been brought in the circuit court upon proper jurisdictional grounds, and had been tried as it was in the state court, and if, on a writ of error from this court, we had decided as the Supreme Court of Texas did,—we should have felt bound by our first decision. We would not have allowed it to be questioned. *Clark v. Keith,* 106 U. S. 464 (27:302). The present case is in exactly the same category. The removal of the cause from the state court does not put us in the position of a court of review over the Supreme Court of Texas. *When it acted, it was the highest court that could act in the cause, and stood in precisely the same position that we stand now. Its action must be accepted by us as that of a court having plenary and final jurisdiction.*"

Williams v. Conger, 125 U. S. 397; 31 L. Ed. 778, 787, 788.

Mr. Justice Brown, reviewing this case, says that the court merely takes the case as it finds it, and is therefore bound by the ruling of what was then the highest court.

Cleaver v. Traders' Ind. Co., 40 Fed. 711.

Where an appeal is dismissed by the Supreme Court of the United States, the opinion below cannot be reviewed on a second appeal.

Hill v. Chicago & Evanston R. R. Co., 140 U. S. 52, 35 L. Ed. 33.

The merits of the case having been once determined by a Circuit Court of Appeals on an interlocutory decree, from which there was no appeal, are final in that court and in the court below, and therefore in the Supreme Court of the United States.

Smith v. Vulcan Iron Works, 165 U. S. 518, 41 L. Ed. 810.

This rule is well settled in other jurisdictions. Where an intermediate court reversed a judgment, and no appeal taken, the first opinion is conclusive on a second appeal.

Henning v. Eldridge, 146 Ill. 305, 33 N. E. 754.

To the same effect:

Warner v. Warner, 158 Cal. 441, 111 Pac. 352.

Campbell v. Perth Amboy Ass'n, 76 N. J. Eq. 347, 74 Atl. 144.

So of a former decision by a territorial court.

Silva v. Pickard, 14 Utah 245, 47 Pac. 144.

St. Croix Lumber Co. v. Mitchell, 4 S. D. 487, 57 N. W. 236.

These cases hold the first opinion *res adjudicata.* The parties have waged their battle on the law in the highest court, and the result is conclusive.

(b) *This is a matter of local law and custom, in which this court should follow the local courts, which have in this action three times ruled the law with appellant.*

Whether the result arrived at by the Supreme Court in its two decisions and by the circuit court is right,

"It is enough to refer to it here as authority with regard to matters of local procedure, as to which innumerable cases have established the weight to be given to the local courts. *Tevis v. Ryan,* 233 U. S. 273, 291, 58 L. ed. 957, 967, 34 Sup. Ct. Rep. 481; *Nadal v. May,* 233 U. S. 447, 454, 58 L. ed. 1040, 1041, 34 Sup. Ct. Rep. 611."

John Ii Estate v. Brown, 236 U. S., p.

This is the ground of the Lewers & Cooke decision in this court. It is there suggested that the Supreme Court on the second appeal in this case might change its mind, *which it did not.* It is said:

"There is every reason for attributing great weight to the decision of the court on the spot. It concerns the powers of another earlier local tribunal, and involves obscure local history concerning a time when the forms of our law were just beginning to superimpose themselves upon the customs of the islanders. Such customs are likely to be distorted when translated into English legal speech."

Lewers & Cooke v. Atcherley, 222 U. S. 285, 56 L. Ed. 202, 205.

(c) *The court of the time when these local laws and customs were in force twice so decided between litigants, to whom the parties in this action are privies.*

It was litigated in both actions in 1858, decided in favor of Kalakaua by Judge Robertson, a member of the "earlier local tribunal," and both he and Chief Justice Allen, who decided the equity suit, were not only familiar with but were a large part of "the obscure local history." The decision in 222 U. S. holds that the probate decision determined "that Kaniu left all her property to Kalakaua," and it is now determined that this property belonged to Kaniu. *Estate of Kaniu* is also conclusive upon the respondent as to the appointment of Kinimaka as guardian; "being in the nature of a proceeding *in rem*" and being "conclusive as to the appointment of executor and the validity and contents of the will." (*Keliipelapela v. Pamano,* ubi supra.) Having been decided subsequently to the Award, it is also conclusive for the purpose relied on in the equity suit, viz., to raise an equitable claim against those holding the legal title under the award.

We can add nothing to what this court has said in the most recent Hawaiian case, excepting to note that in that case the later decision of the Hawaiian Supreme Court was less than seven years old, while in the case at bar the decisions of 1858 were acquiesced in for nearly fifty years. (Findings of Fact, Tr., p. 115.)

"It appears to us surprising to suggest that the highest court of the Hawaiian Islands did not decide in accordance with the requirements of the law of which that court was the final mouthpiece; and that courts of another jurisdiction, sitting *long afterwards, know its duties and powers so much better as to be entitled to pronounce its proceedings void. The caution required in such a venture, even as against less authoritative decisions, has been stated and restated,* from *United States v. Percheman,* 7 Pet. 51,

95, 8 L. ed. 604, 620, to *Michigan Trust Co. v. Ferry*, 228 U. S. 346, 354, 57 L. ed 867, 874, 33 Sup. Ct. Rep. 550. *And when it is added that the grounds for the supposed invalidity are matters mainly of form and local procedure, and wholly of local control, it seems to us plain that the judgment must be reversed.*"

John Ii Estate v. Brown, ubi supra.

(d) *This court should not interfere with the exercise of discretion by the Supreme Court of Hawaii in refusing to open up the decree of* 1858 *in aid of a speculator claiming title under a breach of trust by a wrongdoer, where this would result in mischief to innocent parties and is not essential to the equities of the case.*

Whether the court will open up an old decree is a matter of judicial discretion, and such is said to be the effect of *Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 552, by Chief Justice Frear in *Kapiolani Estate v. Atcherley*, 14 Haw. 651, 663. This seems to be the view of this court in *Lewers & Cooke v. Atcherley*, 222 U. S. 285. In such a case

"it is admissible to look at the real nature and character of the decree as it may appear in the light of surrounding circumstances, for the purpose of determining whether there is such an equitable ground for action as will move a court of equity to interpose."

Gay v. Parpart, 106 U. S. 679; 27 L. Ed. 256, 263, 264.

Chief Justice Fuller, who wrote the opinion in the Lawrence Mfg. Co. case, says it applies an "exceptional rule." (*New Orleans v. Fisher*, 180 U. S. 185.)

The cases cited by the Supreme Court of Hawaii in

the Lewers & Cooke case do not justify exercising a discretion to open up the decree. In *Gay v. Parpart* (ubi supra) and *Hamilton v. Houghton* (2 Bligh 169) decrees *pro confesso* had been taken without service. In *Johnson v. Northey* (Prec. in Ch. 134) the case was settled and the decree stood. (2 Vern. 407.) *Lawrence v. Berney* (2 Rep. in Ch. 127) was decided on the ground of laches, judgment having been taken against the beneficiary of the original decree.

Messrs. Watson and Dickey, former attorneys for Mrs. Atcherley, claim a half interest by virtue of deeds *pendente lite,* evidently in the nature of contingent fees. Mrs. Atcherley herself does not claim as an heir or devise of Kinimaka, or as a purchaser for a valuable consideration, but acquired her title by a deed from a devisee reciting a consideration of $50 (Tr., pp. 84, 85). This deed does not purport to convey the interest of the devisee, nor does it describe the premises or convey any rights under the will of Kinimaka, and is of doubtful validity. Her predecessors in title had acquiesced in the decision for more than forty years and that title rests on the fraud of a guardian who at the same time was acknowledging the rights of his ward.

The plaintiff and its predecessors in title have been in possession continuously since Kaniu's death in 1843, and, after the decision in 1903, sold, relying on the decision, the larger portion of the property by warranty deed for $35,000, and, in addition to being liable on the warranty, is being sued for $40,000 mesne profits.

This court has recently applied this principle affirming a decree in the case of a bill of review, refusing to open up a decree on the ground of newly dis-

covered evidence, adopting the language of the Circuit Court of Appeals:

"In our opinion, taking into account not only the speculative purchase by appellants, but also the good-faith purchase by the Smoky Mountain Company, a case is not presented which appeals to the equitable discretion of the court to allow the review of a decree upon the ground alone of newly discovered evidence. We rest our decision solely upon this proposition. Bearing in mind the rule that this bill of review for newly discovered evidence is not right, no matter how persuasive of error in the original decree the new evidence may be, and that it should not be allowed if such allowance would result in mischief to innocent parties, and having in view the stability necessary to be afforded to decrees, especially of courts of last resort, where disturbance thereof is not essential to the protection of the real equities of the parties before the court, we think the review asked for should be denied. In our opinion, the stability of judgments, and thus the protection of rights acquired in reliance upon them, are such as, under the peculiar circumstances of this case, to make the review asked for inequitable."

Hopkins v. Hebard, 235 U. S. 287.

(e) *The minor never had his day in court until the actions in* 1858.

The guardian cannot maintain an action at law against the ward during guardianship; nor the ward against the guardian.

21 Cyc. 186.

The courts will not permit a guardian who has an interest in an action hostile to the infant to conduct it in his behalf.

Woerner, Guardianship, Sec. 21.

Schouler, Domestic Relations, p. 469.

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear, *and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959, 963.

The italics are those of this court.

Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 51 L. Ed. 345.

"Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that Charter (2 Coke, Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

Ochoa v. Hernandez Y Morales, 230 U. S. 137; 57 L. Ed. 1427, 1437.

V.

THE HAWAIIAN COURT ERRED IN HOLDING THAT THE DECISION OF THIS COURT IN THE LEWERS & COOKE CASE WAS BINDING ALTHOUGH ERRONEOUS. BUT, IF BINDING, IT SHOULD BE OVERRULED.

The Kapiolani Estate, Limited, being neither party nor privy, is not concluded. The case is not in point, unless the guardianship is found, upon which the Hawaiian court say:

"The facts remain, however, that the guardianship had been found as a fact by the court of land registration and that finding was before this court in the Lewers & Cooke case, and that the decree entered in that case was affirmed on appeal, with the result, as above stated, that we are concluded by the decree." (Tr., p. 101.)

The Lewers & Cooke case is full of difficulties, probably arising in part from lack of familiarity with "obscure local history." Not obvious and immaterial errors, as the statements that "Kalakaua filed a bill in equity in the *court of land registration,*" or that Kaniu's rights in the land were "not fully defined," when both parties in their briefs had defined these rights as secured by the Constitution and laws, but more serious matters, such as:

(1) "Later the King gave the land to Kinimaka." The context shows that this cannot refer to the alleged disallowance of the will. The only thing in the testimony to which it could have reference is that of Nauhele (Tr., p. 15) that "in 1848 at the time of the great division of land Kinimaka went before the King and claimed the land of Kaniu for himself * * * the King said part of the land should be set apart for the Government and part for Kinimaka." But this does not have any bearing on the land involved in this litigation, which was a town building lot. That division was of the lands of chiefs or landlords, that is to say, Ahupuaas and Ilis. It would have applied if the land of Onoulimaloo was involved in this case, which was at issue in the action of 1858, but for the

fact that that division did not establish title but merely fixed the share of the Government. Again, the power of the King to take away Kalakaua's rights in the land under the will was litigated and is *res adjudicata* between the parties, since the Constitution "guaranteed protection alike for chiefs and common people in their lives, liberty and property." (*Estate of Kaniu,* p. 85.)

(2) That Kaniu *"had certain rights,* not fully defined, in the land, and left *all* her property to Kalakaua," with the further statement that the probate decree "determined only that Kaniu left *all her property* to Kalakaua, but not that any particular property belonged to the inheritance," is only intelligible on the assumption that Kalakaua's ownership of certain rights in the property in some way is defeated by the fact that "later the King gave the land to Kinimaka." But as it is determined by that decision that Kaniu left all her property to Kalakaua and the King could not take away this property, and as Kaniu had certain property, viz., rights in this land, this would appear to be an adjudication between the parties upon the title to these rights. (*Keliipelapela v. Pamano,* 1 Haw. 503; *Nakookoo v. Noholoa,* 19 Haw. 667.)

(3) The question of guardianship, the reporter does not mention in the head-notes. It was found by the trial court, which alone could pass upon the fact, that in the suit of 1858 it was in evidence that Kinimaka "was the natural guardian of the minor, David Kalakaua, who became of age about 1856" (Lewers & Cooke, Tr., p. 54). The Supreme Court of Hawaii, after denying, in the opinion on rehearing, the claim of counsel for Lewers & Cooke that in some way it had reversed the findings of fact, drew a blue pencil

through the words *"was the natural guardian of the minor,"* so that the sentence read: "David Kalakaua, who became of age about 1856." Upon this state of the record, this court said:

"So it is said that Kinimaka was the natural guardian of Kalakaua; we presume on the evidence that Kaniu assented to a suggestion that she had better leave her property in Kinimaka's hands till Kalakaua came of age."

There is some confusion here, for it was not claimed that Kinimaka was the natural guardian *because of the oral will,* but because he was the adoptive and foster father of Kalakaua. It was also claimed that Kinimaka was testamentary guardian *by virtue of the will,* and this both under the statute and because it was *res adjudicata* in *Estate of Kaniu.* The opinion confuses and apparently disallows both claims, and of course if there was no guardianship the vital ground on which the case in 1858 stood fails; and the Lewers & Cooke case is not authority in this case, in which that vital point is found.

(4) Still more confusing is the next clause of the opinion:

"But it would be going rather far to apply the refined rules of the English chancery concerning fiduciary relations between two Sandwich Islanders in 1846, on the strength of such a fact."

Assuming that the date 1846 is 1849, the date of the award, this declares:

(a) That the right of a ward to call a guardian to account for exploiting his estate, and the duty of the court to vindicate that right, which at the time of the decision had been committed by statute and declared by the same court in cases involving like prin-

ciples "to strike at the root of the evil," to have "its foundation in sound policy" and "to guard against the hazard of abuse by removing the trustee from the temptation to make a gain to himself from his fiduciary capacity," is a "refined rule of the English chancery concerning fiduciary duties." That the characterization is inconsistent with the history of law, and that these rules had been incorporated into Hawaiian statutes and decisions, we have already shown.

(b) That guardianship cannot be predicated on an oral will in the manner stated. But the court overlooks the facts that "Kaniu assented to a suggestion" made by Kekuanaoa, the Judge of the Court of Oahu, before whom it was usual to make these oral wills (Tr., p. 16); that it is *res adjudicata* that Kinimaka "made and declared an oral will, by which she bequeathed all her separate property, both real and personal, to the petitioner, giving directions, at the same time, that her husband, *Kinimaka, should hold and take charge of the property for the heir until he should become of age*" (*Estate of Kaniu,* p. 84); that the Statutes of Hawaii authorized Kaniu to name by will a guardian of a child, who "shall be the guardian of his person, his property, and of his moral and intellectual training," and that Kinimaka claimed the guardianship. (Tr., pp. 17, 23, 25.)

We respectfully submit that the use of the expression "between two Sandwich islanders in 1846," apparently intended as an invidious comparison, is not historically justified and shows a lack of sympathy with the controlling ideals of an integral part of the American people. (See Dibble's History of the Sandwich Islands, Chap. XIII, written in 1843.) It overlooks the facts that Hawaii has a judicial history reaching back farther than any state west of the

Mississippi, excepting Louisiana, Missouri, Arkansas and Iowa, a judicial history of which it is proud; that at the time referred to its thought was dominated by Christian missionaries, who had implanted their high ideals in its laws, its justice and its human relations, into the life of that nation. It was in 1843 that Kamehameha III uttered those noble words, since then the motto of Hawaii: "Ua mau ke ea o ka aina i ka pono"—"The life of the land rests on righteousness."

We submit the expression is not worthy of the learning or wisdom of the most august tribunal on the face of the globe, particularly in a case which sustains a speculator in opening up a judgment acquiesced in for more than forty years, which judgment restored to a minor property fraudulently acquired by the guardian from his ward's estate.

If the vital fact of guardianship is not in the Lewers & Cooke case, then it is inapplicable to this case. If it is, then we submit that it is the duty of this court to overrule it; for, if this court does not, there is no court of appeal excepting that highest court of all, the sober judgment of all time.

WILLIAM R. CASTLE,
DAVID L. WITHINGTON,
W. A. GREENWELL,
ALFRED L. CASTLE,
For Appellant.

APPENDIX.

THE FIRST CONSTITUTION OF HAWAII,
Granted by Kamehameha III, October 8, 1840.

DECLARATION OF RIGHTS, BOTH OF THE PEOPLE AND CHIEFS.

* * * *

Protection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property, while they conform to the laws of the kingdom, and nothing whatever shall be taken from any individual except by express provision of the laws.

CONSTITUTION.

* * * *

III. The law shall give redress to every man who is injured by another without a fault of his own, and shall protect all men while they conduct properly, and shall punish all men who commit crime against the kingdom or against individuals, and no unequal law shall be passed for the benefit of one to the injury of another.

(Thurston, pp. 1, 2.)

CONSTITUTION OF JUNE 14, 1852.

ARTICLE 84. The judicial power shall extend to all cases in Law and Equity, arising under the Constitution, any law of this Kingdom, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls, and to all cases of admiralty and maritime jurisdiction.

ARTICLE 86. The Chief Justice of the Supreme

Court shall be the Chancellor of the Kingdom; he shall be *ex-officio* President of the House of Nobles in all cases of impeachment unless when impeached himself; and exercise such jurisdiction in equity or other cases as the law may confer upon him, his decisions being subject, however, to the revision of the Supreme Court, on appeal.

ACT CREATING BOARD OF COMMISSIONERS TO QUIET LAND TITLES. (Thurston, p. 137.)

SECTION 1. His Majesty shall appoint, through the Minister of the Interior, and upon consultation with the Privy Council, five commissioners, one of whom shall be the Attorney-General of this Kingdom, to be a board for the investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any landed property acquired anterior to the passage of this Act; the awards of which board, unless appealed from as hereinafter allowed, shall be binding upon the Minister of the Interior and upon the applicant.

SECTION 5. It shall be the special duty of said Board to advertise in the Polynesian newspaper, during the continuance of their sessions, the following public notice, viz.:

TO ALL CLAIMANTS OF LAND IN THE HAWAIIAN ISLANDS—The undersigned have been appointed by His Majesty the King, a board of commissioners to investigate and confirm or reject all claims to land arising previously to the ——— day of ———————, 18——. Patents in fee simple, or leases for terms of years, will be issued to those entitled to the same, upon the report which we are authorized to make, by the testimony to be presented to us.

The board holds its stated meetings weekly at ————————, in Honolulu, Island of Oahu, to hear the parties or their counsel, in defence of their claims; and is prepared, every day, to receive in writing, the claims and evidences of title which parties may have to offer, at the————————, in Honolulu, between the hours of 9 o'clock A. M. and 3 o'clock P. M.

All persons are required to file with the board specifications of their claims to land, and to adduce the evidence upon which they claim title to any land in the Hawaiian Islands, before the expiration of two years from this date, or in default of so doing, they will after that time be forever barred of all right to recover the same, in the courts of justice.

Dated ——— day of ————————, 18——.

SECTION 6. The said Board shall be in existence for the quieting of land titles during two years from the first publication of the notice above required, and shall have power to subpoena and compel the attendance of witnesses by discretionary fine; in like manner when in session for the hearing of arguments, to punish for contempt; and they shall have power to administer oaths to witnesses, and to perpetuate testimony in any case depending before them, which, when so perpetuated, shall be valid evidence in any court of justice created by the Act to organize the judiciary.

SECTION 7. The decisions of said Board shall be in accordance with the principles established by the Civil Code of this Kingdom in regard to prescription, occupancy, fixtures, native usages in regard to landed tenures, water privileges and rights of piscary, the rights of women, the rights of absentees, tenancy and subtenancy—primogeniture and rights

of adoption; which decisions being of a majority in number of said Board, shall be only subject to appeal to the Supreme Court, as prescribed in the Act to organize the judiciary, and when such appeal shall not have been taken, they shall be final.

SECTION 8. All claims to land, as against the Hawaiian Government, which are not presented to said Board within the time, at the place and in the manner prescribed in the notice required to be given in the fifth section of this article, shall be deemed to be invalid, and shall be forever barred in law, unless the claimant be absent from this Kingdom, and have no representative therein.

SECTION 9. The Minister of the Interior shall issue patents or leases to the claimants of land pursuant to the terms in which the said Board shall have confirmed their respective claims, upon being paid the fees of patenting or of leasing (as the case may be) prescribed in the third part of this Act, unless the party entitled to a lease shall prefer to compound with the said Minister as in the succeeding section allowed.

SECTION 13. The titles of all lands claimed of the Hawaiian Government anterior to the passage of this Act, upon being confirmed as aforesaid, in whole or in part, by the Board of Commissioners, shall be deemed to be forever settled, as awarded by said Board, unless appeal be taken to the Supreme Court, as already provided. And all claims rejected by said Board, unless appeal be taken as aforesaid, shall be deemed to be forever barred and foreclosed, from the expiration of the time allowed for such appeal.

THIRD ACT KAMEHAMEHA III, 1847. *AN ACT TO ORGANIZE THE JUDICIARY DEPARTMENT OF THE HAWAIIAN ISLANDS.*

Chapter I.

SECTION IV. The judgments and decisions of said courts, whether of record or not of record. unless appealed from, shall be final and binding upon the parties, and upon the subject-matter before them, and shall be, as to the causes so decided and unappealed from, the law of this kingdom, not to be disregarded, but to be fulfilled by the parties and enforced by mandate of the courts. Judgments and decisions passed and rendered by two-thirds of the Judges of the Supreme Court, shall be the absolute law of this kingdom, as effectually binding in the controversy or question submitted to them, as if passed by the Legislative Council of Nobles and Representatives, and sanctioned by the King in his executive capacity. Said judgments and decisions of the Supreme Court, shall be binding and compulsory upon all inferior courts, in all matters, causes, and controversies, and the parties litigant, plaintiff, defendant, prosecutor, or prosecuted, may cite them for that purpose, and they shall be taken notice of by said courts as such, in the administration of justice. The reasonings and analogies of the common law, and of the civil law, may in like manner be cited and adopted by any such court, so far as they are deemed to be founded in justice, and not at conflict with the laws and usages of this kingdom. The principles sustained by said courts when sanctioned by the supreme court, shall become incorporated with the common law of the Hawaiian Islands, and shall form an essential ingredient in the civil code: Provided al-

51

ways, that the Legislative Council of Nobles and Representatives, may by act sanctioned by His Majesty, and duly promulgated, correct, alter, or abrogate the principles of such abstract judgments and decisions, in analogous cases afterwards to arise before said courts, or any of them.

Chapter IV, Article III.

SECTION VIII. The chief justice of the superior court, subject to the said court in *banco,* shall alone have power at chambers, to entertain bills in equity for the discovery of fraud, or of facts important to any complainant; and to enforce, by bill and decree in equity, hypothetical rights of property; to decree the foreclosure of mortgage liens upon landed or personal property; to entertain application for divorce not brought before the governors of the respective islands; to relax the strict rules of law applicable to any case, or to enlarge or restrain the meaning of the law, when the strict application thereof would work injustice to a party.

SECTION IX. In all such matters, applications and controversies, the said chief justice shall have all the equity powers incident at common law to the office of chancellor, and his rules, orders and decrees thereon, shall be subject to review and reversal, or amendment, by the said superior court upon the record in *banco,* and by the supreme court in like manner.

SECTION XVIII. They shall have full powers to compel executors, administrators and guardians to the performance of their trusts, and to require them to give account of their administration. They may in case of the moral unfitness or turpitude of the executor to any will appearing after letters tes-

tamentary granted, or in case of the death or surrender, or wrongful absconding of any such executor, upon satisfactory proof, appoint any suitable person applying or consenting, administrator *de bonis non administravit*, annexing to the letters of administration the testator's will, to be scrupulously followed by such administrator. And they may in like manner, and for the like causes, supersede any guardian appointed by will or by letters of guardianship.

JUDICIARY ACT OF MAY 26, 1853.

SECTION 2. Said Supreme Court shall have jurisdiction in all cases in law or equity, in all cases affecting ambassadors, other public ministers and consuls, and in all admiralty and maritime cases, whether the same be brought before it by original writ, by appeal or otherwise. It shall also have all the powers, and exercise all the jurisdiction belonging to either the Supreme or Superior Court, as at present constituted, in all cases, legal or equitable, civil or criminal.

SECTION 4. The Chief Justice of the Supreme Court shall be the Chancellor of the Kingdom, and shall have power at chambers to decree the foreclosure of mortgages, to grant divorces, to issue process in, and to hear and determine all probate matters, and all cases in bankruptcy, admiralty or equity, subject, however, to an appeal to the full Court. Moreover, the Chief Justice and two Associate Justices of the Supreme Court shall respectively have all the powers at chambers conferred by present laws upon the Chief Justice and Associate Justice of the Superior Court.

SECTION 5. The Supreme Court shall have the general superintendence of all courts of inferior ju-

risdiction, to prevent and correct errors and abuses therein, where no other remedy is expressly provided by law.

SECTION 7. Said Court shall have power to make and award all such judgments, decrees, orders and injunctions, to issue all such executions and other writs and processes, and to do all such other acts as may be necessary or proper to carry into full effect, all the powers, which are or may be given to it by the Constitution and laws of the Kingdom.

SECOND ACT OF KAMEHAMEHA III. PART I. CHAPTER IV. ARTICLE I.—OF THE MARRIAGE CONTRACT.

SECTION VII. The children of a valid marriage shall be denominated legitimate; and the husband of said marriage shall be liable for their suitable and proper support in all respects, until they severally attain the age of twenty years, when his liability shall cease. Said husband shall also be liable to do all the parental duties provided in the third, fourth and fifth parts of this act. He shall also be entitled to control and manage his children in all respects during their minority, and require reasonable service at their hands. He shall be the natural guardian of their persons and of their property; he shall be liable to prosecution for tortuous acts committed by them, and entitled to prosecute and defend all actions at law in which they or their individual property may be concerned: Provided that all minors, evincing, to the satisfaction of a court of justice, sufficient understanding to be conscious of right and wrong, shall be, in their own persons, liable for crimes committed by them, to the same extent and in the same manner, as persons at law.

PART IV. CHAPTER I. OF THE PARENTAL DUTIES.

SECTION I. Parents, that is to say first the father, and in case of his death, the mother, or in case they be both dead, guardians legally appointed, shall alone have control over the actions, the conduct and the education of their children within the years of legal minority. It shall not be lawful to interfere with such parents or guardians in the legitimate exercise of said control. They shall have the right at all times to recover possession of their children by *habeas corpus,* they shall have the right of moderate chastisement for the good of their children, but they shall not, on pain of the criminal code, use undue or unnecessary severity towards them.

SECTION II. It shall be competent to any legally appointed judge to deprive any parent maltreating or unmercifully using his or her child of the custody thereof, and to confide such child to some suitable guardian, at the expense of the parent offending.

SECTION III. It shall be competent to parents to consent in writing, and in the presence of a judge, to the adoption of their children by any suitable third party; but in that case the terms of the adoption must be definitely stipulated in the agreement, and must not be a beneficial consideration to the parents, but to the child, satisfactory to the judiccial officer acknowledging the adoption. All such acts of adoption shall be recorded by a notary public as in and by the fifth part of this act provided. Every person so adopting a child shall become in law entitled to the parental rights over him during minority, *and liable from the day of adoption to all the parental duties and obligations.*

SECTION IV. It shall be competent to any parent legally entitled to the custody, care and education of a child to bequeath such right to some guardian to be appointed and named in his will. Upon the death of such testator, and upon probate of the will, it shall only be discretional with the judge of probate to refuse such appointed guardian, his letters testamentary, and of guardianship, in case of crime or of open immorality or of notorious drunkenness. The guardian of a child, by will, shall be the guardian of his person, his property, and of his moral and intellectual training. Such guardian shall stand at law in the place and stead of the child's father, and be answerable in like manner. In case the father shall have died intestate, or dying testate, no guardian is named in the will, the court of probate shall have power, upon application, to appoint a guardian as prescribed in the act to organize the judiciary; and the certificate of the minister of public instruction, impressed with the seal of his department, shall be *prima facie* evidence of the competency and fitness of the person named as guardian to be appointed such by the court.

SECTION V. In cases of bastardy the mother being the only parent recognized by law, shall be guardian of the child, and liable in like manner as if the father were dead.

SECTION VI. The rules of descent and of natural inheritance shall be those defined by the civil code, and the priority of rights to the guardianship of orphan children shall be those prescribed by the act to organize the judiciary.

INDEX.

CASES CITED.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1914

NO. 174

KAPIOLANI ESTATE, LIMITED,
Appellant,

v.

MARY H. ATCHERLEY, LYLE A. DICKEY, and E. M. WATSON,
Appellees.

MARY H. ATCHERLEY,
E. M. WATSON,
LYLE A. DICKEY,
Appellees,
pro se.

STATEMENT OF THE CASE.

Lewers and Cooke, Limited, a corporation in possession of the land now in controversy under warranty deeds from Kapiolani Estate, Limited, appellant herein, in 1905 brought an action in the Court of Land Registration of Hawaii to register its title. In that action equitable as well as legal questions were considered, the main question being the equitable one whether because of certain litigation of 1858 Mary H. Atcherley, contestant, should be con-

sidered to hold the legal title merely as trustee. Lewers and Cooke, Ltd., lost the case, and the final decree of the Supreme Court of Hawaii that it had no title legal or equitable to the land was confirmed by this court.

In re *Lewers and Cooke,* 18 Haw. 625, 19 Haw. 47.

Lewers and Cooke v. Atcherley, 222 U. S. 294. Record, pp. 116-7.

Kapiolani Estate, Ltd., was not named as a party of record in the case, but employed attorneys to assist in the examination of witnesses in the trial, in an argument for rehearing in the Supreme Court of Hawaii and in perfecting the assignment of errors on the appeal of Lewers and Cooke to this court. (Record, p. 117.)

This is a suit in equity brought by appellant, Kapiolani Estate, Ltd., whose interest is that of a warrantor in its deeds to Lewers and Cooke, Ltd., and of one liable to damages because of former possession of the land, to have defendants declared to hold the legal title in trust and ordered to convey the land to petitioner (the title would then at once under petitioner's warranties enure to Lewers and Cooke), and to have defendants enjoined from further prosecuting an ejectment suit against appellant, Lewers and Cooke, and others. The only ground alleged in the bill is the effect of the above mentioned litigation of 1858.

The deeds to Lewers and Cooke, Ltd., were made in 1905. Mary H. Atcherley had in 1901 begun a suit in ejectment for the land and this suit was begun in 1902 and had been before the Supreme Court of Hawaii on demurrer and was pending in

the Circuit Court at the time Lewers and Cooke, Ltd., went into possession under its deeds, but this case lay idle during the pendency of the Lewers and Cooke case and came to trial after its conclusion, the conveyances to Lewers and Cooke and the proceedings in that case being set up by supplemental pleadings. (Record, pp. 68-82.)

Defendants claimed that the decision of the Supreme Court of Hawaii and the United States in the Lewers and Cooke case settled the law and should be followed; that the petitioner as a mere warrantor and former possessor of the land had no right to the relief prayed and was without standing in equity on account of laches, estoppel and *res judicata*.

Petitioner opposed all these claims, urging that it was not a party to the Lewers and Cooke case and could reargue all questions involved; that the Lewers and Cooke case was bad law and should not be followed; that the cases were not identical as a guardianship question involved had not been properly called to the attention of this court in the Lewers and Cooke case; and that, as a demurrer to the original bill had been overruled, the court was bound by the law of the case to decide for petitioner.

The Supreme Court of Hawaii, without considering all defendants' points, followed the decisions in the Lewers and Cooke case as controlling and rendered decree for defendants, but in doing so, reexamined the points involved, and two out of three judges, a majority of the court, expressed the opinion that the former decisions in the Lewers and Cooke case were erroneous.

Appellant accordingly has now raised in this court the additional point that as this court based its former decision largely on the fact that the matters

involved were local and followed the decision of the local court, the one on the spot, it should now reverse its former decision and the decree in this case because of the intimation that the local court has changed its mind and would like to change its opinion.

Appellees claim that should this court listen to such a plea and be willing to re-examine the original questions that as between two differing opinions of the court on the spot it should follow the one that is right, and that this is the one in the Lewers and Cooke case that has been followed and not the dictum in the present one.

The possibility that this court will heed appellant necessitates a re-statement by appellees of the merits of the case and a re-argument.

In 1845-7 the Hawaiian monarchy was organized into a modern form of government by three elaborate acts. The second of these, passed in 1846, abolished the old feudal tenure of land and created a court entitled Board of Commissioners to Quiet Land Titles, which should make awards which should be final and the foundation of fee simple titles in the kingdom. The chiefs and king partitioned their several feudal rights in the main lands of the kingdom in a book called the "mahele" book in which on one page the king would give up his rights in lands held by a chief and the chief would on the corresponding page release to the king his rights in other lands held by him. Houselots and small lots were awarded in fee simple to those who proved possession held under any appropriate chief. The adjudication bound all.

July 14, 1846, Kinimaka filed a claim for an award of three parcels of land, claiming one from Kaniu,

his wife; one from Kapiiwi; and one, the property in controversy, from Liliha. The Board of Commissioners to Quiet Land Titles awarded him all the land claimed April 10, 1849.

Kinimaka died in 1857, giving all his property to a daughter, Kaniu Kinimaka, for life; after her death to David Leleo Kinimaka, a son, for his life; remainder to a son, Moses Kinimaka, in fee. Mary H. Atcherley, appellee, a daughter of David Leleo Kinimaka, purchased the remainderman's interest in 1897. David Leleo Kinimaka died in 1884 and the first life tenant in 1901.

Kapiolani Estate, Ltd., derives the title formerly held by it and conveyed by it to Lewers and Cooke, Ltd., from David Kalakaua, who July 19, 1858, filed a bill in equity against Pai (second wife of Kinimaka) and Richard Armstrong, guardian of his three children. In this bill Kalakaua claimed that the land awarded to Kinimaka by said award (and other land awarded to him by other awards) had in 184? belonged to one Kaniu, who died in 1843, and by oral will left him, Kalakaua, all her property and at the time of her decease directed her husband, Kinimaka, to manage it for him during his infancy; that Kinimaka had wrongfully and fraudulently procured the issuance of the awards in his own name; that the will had been probated in 1858 after Kinimaka's death. He prayed in his bill that it might be decreed that Kinimaka in his lifetime procured the awards and held possession of the lands for the use and benefit of Kalakaua and that Richard Armstrong, guardian of the minor children of Kinimaka, might be ordered to convey to Kalakaua all the right, title and interest of said children in said lands, and that the widow, Pai, be ordered to convey

all her interest in said lands. Service was made on the attorney of Armstrong and on a member of the household of Pai, answer signed and filed by the attorney and a hearing had.

At the hearing the secretary of the Land Commission was called and brought in what testimony had been preserved of that offered before the Land Commission on the petition which included this land and two other parcels. This evidence only related to one of the three pieces, and this is not identified except that it is a parcel that came to Kinimaka from his wife, Kaniu. The other two were evidently either awarded without evidence or on evidence not preserved in this record. (Record, p. 24.) Appellees claim that this evidence was improper and that the presumption that the judgment of the Land Commission was founded on evidence sustaining the claim in the petition of Kinimaka is supreme and not subject to collateral attack.

Evidence of one who brought up David and of a servant of Kaniu was also put in (Record, pp. 24-5) to show that some land was regarded by them as Kaniu's and David's. These witnesses did not distinguish between different parcels or apparently know that five different parcels of land were involved in the case. The evidence of each refers to but one place. C. Kanaina testified as to one of the chief's lands, Onoulimaloo, that it had originally belonged to Kaniu, that in 1848 Kinimaka got that land because he appeared for her and her heirs and that he understood that land then to belong to David. (Record, p. 23.)

After this testimony the claim was raised August 19, 1858, for the defense that Kalakaua was estopped by the award to Kinimaka. (Record, pp. 25-6.)

November 2, 1858, David Kalakaua filed a discontinuance as to all lands but two in consideration of certain sums of money paid by Kinimaka during his lifetime for his use and benefit, and on the same day the clerk signed and filed a document as follows:

"Supreme Court in Equity at Chambers,

2 Novr., 1858

David Kalakaua

vs.

Richard Armstrong, Guardian of Kaniu, David Leleo, & Kinimaka, minor children of Kinimaka, Deceased.

Before Honorable E. H. Allen, Chief Justice:

The Court did order, adjudge and decree in this matter that Mr. Armstrong, as Guardian of Kaniu, David Leleo and Kinimaka, Minor children of Kinimaka, deceased, do convey to David Kalakaua, the plaintiff in this case, the land named Omulimalo on the Island of Molokai and the first apana of land set forth in Royal Patent No. 1602 filed in this cause.

JNO. E. BARNARD,
Clerk Supreme Court."

(Record, p. 27.)

These proceedings were alleged as fact in the bill in this case and also a prior suit by Kalakaua against Kinimaka which involved many more lands and abated at the death of Kinimaka. The record in the probate case with all its evidence was also alleged as fact by the bill in this case (Record, pp. 4-5) and found as fact by the Supreme Court of Hawaii (Record, p. 113).

These last two records might possibly have been ruled out, but were not objected to by defendants, who think they throw light on the proceedings before the chancellor in *Kalakaua v. Armstrong* and show

conclusively that there was no fraud, active or constructive, by Kinimaka.

(The Supreme Court of Hawaii takes judicial notice of its own records. *Kapiolani Estate v. Atcherley,* 14 Haw. 651, 658-660, 668.)

The record of the probate case shows that the Supreme Court of Hawaii in its findings (Record, p. 111) that by the verbal will of Kaniu "her husband, Kinimaka, was made the testamentary guardian of the child, to take charge of the land for him" not only ignored the pleadings and issues of this case but the record of the probate of the will itself, for the record, which is correct (Record, p. 113), makes no probate of any will appointing a testamentary guardian. The entire judgment of probate is is follows:

"In the matter of the Estate of L. H. Kaniu,
Deceased.
Judgment.

My judgment is that the verbal will of L. H. Kaniu, made in the year 1843, by which she bequeathed all her property to David Kalakaua is duly proven, and that letters testamentary thereon, with copy of this judgment annexed, be issued to him, the said David Kalakaua.

G. M. ROBERTSON,
Associate Justice of the Supreme Court."

(Record, p. 17.)

This finding of fact should be ignored as contrary to this other, controlling finding as to what the will actually was as probated, and because it is not one of the facts alleged in the bill. Guardianship so far as it comes into this case is not a general guardianship of the person nor a general guardianship of the property (there is a hint in Kalakaua's petition

that A. Paki was his general guardian (Record, p. 11), nor a testamentary guardianship of this particular property, but a *de facto* guardianship, following a dying request of Kaniu.

Defendants claim that the chancellor in 1858 had no jurisdiction to entertain the bill, that no fraud was shown, and that the minor children, not being named as parties to the bill nor served, were not bound by the decree, and that to take the property from their grantees now would be to deprive them of property without due process of law.

This raises questions based on the history of Hawaii and the unusual state of law in 1843, when Kaniu died, and in 1846, when the Board of Commissioners to Quiet Land Titles was formed.

The tenure of lands in Hawaii up to 1846 was feudal, and up to 1839 was a despotism, when the king and each overlord under him had absolute ownership and control of the land and people under him. There was no written language until after 1822, when missionaries first reduced the language to writing.

The constitution of 1839 and laws down to the establishment of the Board of Commissioners to Quiet Land Titles gave protection to interests in land, but these interests were still feudal and undefined. There were courts, with the King chief justice, but they were not courts of record, and each judge must have been largely a law unto himself. Written Hawaiian reports begin after the creation of the Board of Commissioners to Quiet Land Titles. Until after the creation of this Board, guardianship and the peculiar jurisdiction of courts of equity are not mentioned in Hawaiian laws. This court was created before equity courts.

The awards of the Board of Commissioners to Quiet Land Titles were by law made final and, defendants claim, were intended to do away with feudal tenure and to settle forever all claims to lands arising prior to December 10, 1845, including claims from alleged fiduciary relationships as urged by Kalakaua.

Defendants also claim that no fraud was shown. The fraud claimed and shown was constructive fraud, created *ex post facto,* based on a will probated after death of the man alleged to have committed the constructive fraud, and the ancient record shows no fraud of any kind.

ARGUMENT.

THE SUPREME COURT OF HAWAII DID NOT ERR IN HOLDING THAT IT MUST FOLLOW A UNITED STATES SUPREME COURT DECISION, THOUGH THAT DECISION UPHOLDS A DECISION OF THE LOWER COURT ON A MATTER OF LOCAL LAW.

This hardly needs argument. An inferior court should always follow the precedents of a superior court.

"Under the rule of *stare decisis,* where a principle has been passed upon by the court of last resort, it is the duty of all inferior tribunals to adhere to the decision, without regard to their views as to its propriety, until the decision has been reversed or overruled by the court of last resort or altered by legislative enactment."

26 A. & E. Enc. Law, 2d ed., 163, 5b.

"But since the former decision in this court the Supreme Court of the U. S. has held * * * The

decisions of that court are of binding authority upon this court, and * * * we must hold * * *"

Steel v. Boley, 7 Utah 66.

"Nor would the appellate court on the second appeal, we apprehend, be obliged to adhere to a proposition of law laid down on the first appeal, when this court had, since the first appeal, decided the precise question contrary to the rule announced by the Appellate Court. To so hold would lead to most illogical results."

Zerulla v. Supreme Lodge, 223 Ill. 520.

While this court on a question of local law usually affirms the decision of the local territorial court, it is under no obligation to do so, and its decision is no less a decision of the United States Supreme Court and binding as law on future litigation in the jurisdiction from which the appeal is taken. To hold otherwise and encourage litigants to ignore this court's decisions and re-argue questions of local law before inferior tribunals whenever, as in this case, there has been a complete change of the personnel of the local court, with a confidence that if the local court changes its opinion, the United States Supreme Court decision will count for naught, but will be submissively changed to suit the lower court's changing opinions, is to lower the dignity of this court and the value of its decisions.

(Since the making of the decision here appealed from, the personnel of a majority of the local court has again been changed.)

THERE ARE NO FACTS IN THIS CASE WHICH GIVE APPELLANT A GREATER EQUITY THAN WAS POSSESSED BY ITS GRANTEE IN THE FORMER CASE.

Appellant claims that "the fact that Kinimaka was the guardian of Kalakaua at the time the claim for this land was presented to the Board of Land Commissioners was not included in the findings of fact certified on the appeal in said cause." Assignment of Errors No. 4, Record, p. 110.

But no such fact is alleged in the Bill of Complaint in this case. Whether or not Kinimaka actually was a guardian, either natural, testamentary or *de facto,* is absolutely not an issue in this case.

The bill in this case was drawn to test the effect of certain litigation of 1858 (see stipulation, Record, p. 2), and the only allegations in it as to guardianship are these:

"on the 29th day of December, A. D. 1856, said David Kalakaua filed his petition in equity in the Supreme Court of the Hawaiian Islands against the said Kinimaka, claiming that the said Kinimaka held title to the land named in paragraph 2 of this bill in trust and as the guardian of said Kalakaua, and not otherwise."

Record, p. 4.

"afterwards, to wit, upon June 19th, 1858, the said David Kalakaua filed a further petition alleging substantially the same facts as in the petitions of December 29th, 1856, and of March 16, 1857."

Record, p. 5.

Guardianship by Kinimaka of Kalakaua was not referred to in any answer filed in this case.

This case brings into question only the validity and force of legal proceedings of 1858. Into that the question of guardianship enters, but as a conclusion of law, not of fact.

In the Lewers and Cooke case the ancient proceedings and their records were alleged as facts just as they are in the Bill of Complaint in this case, and the findings of fact in that case therefore brought before the court for consideration all the questions raised by the bill in this case. raising them in the same way. As that was a suit by Lewers and Cooke to register its title in the Court of Land Registration, it, of course, raised, however, many questions not open in this case under the pleadings here.

It is true that the lower court in its findings of fact in this case says:

"At the time of her death she made a verbal will, by which she bequeathed all her property to David Kalakaua; and by the same will her husband, Kinimaka, was made the testamentary guardian of the child, to 'take charge of the land for him.'" (Record, p. 111.)

But appellees urge that the lower court has no right to make findings not authorized by the pleadings in the case. It is too late after trial of a case to inject new facts in an attempt to make a new and stronger case.

Moreover, as shown in the statement of the case *supra,* this finding is really a conclusion of law. Whether or not there is a testamentary guardian depends upon a construction of the will. The express finding as to what the will is, controls any construction of the will, though that construction be in form a finding of fact. The Supreme Court of Hawaii (Record, p. 113) makes a finding as to the record of the probate procedings and this record (Record, p. 17) shows that the judgment of probate of the will contains no reference to guardianship.

The law quoted by appellant (Brief, p. 51) as to testamentary guardians was passed after death of Kaniu and can not affect matters of 1843.

The matter of guardianship then comes into this case precisely as it did in the Lewers and Cooke case by reference to evidence and admissions in the record of the ancient equity case and the ancient probate case.

The court below has also found (Record, p. 111) that Kaniu owned this land prior to 1843 in so far as rights of property in land existed and were recognized at that time. This, also, is a conclusion of law alleged as fact. There is no allegation in the bill that authorizes such a finding. The bill merely alleges that Kalakaua in his equity suit claimed the land under Kaniu (Record, pp. 4-5) and sets out the full proceedings of the ancient equity suit.

Appellees urge that there is a necessary implication that the Land Commission Award was supported by evidence that Liliha gave possession to Kinimaka in accordance with the claim in Kinimaka's petition and that Kaniu never had even any feudal interest in this land.

Kalakaua v. Keaweamahi, 4 Haw. 579.

THE ARGUMENT THAT GUARDIANSHIP WAS CLAIMED AND PROVED IN THE ANCIENT EQUITY CASE AND THAT THE RESULTANT FIDUCIARY RELATIONSHIP BETWEEN KINIMAKA AND KALAKAUA GAVE A COURT OF EQUITY IN 1858 AUTHORITY TO RE-INVESTIGATE THE QUESTION AS TO WHAT PERSON HAD A RIGHT TO THE AWARD AND TO ORDER THE GUARDIAN OF THE HOLDERS OF THE ALLODIAL TITLE CREATED BY THE AWARD TO CONVEY IT TO KALAKAUA WAS PRESENTED BOTH TO THE SUPREME COURT OF HAWAII AND THIS COURT IN THE LEWERS AND COOKE CASE.

In the opinion in this case, the majority of the court, in deciding that the opinions in the Lewers and Cooke case were wrong, hold that to order a conveyance of the title given by the award is not to make an attack on the award because it does not make the award void.

"We are satisfied that this court fell into error in the Lewers and Cooke case in taking the view that the equity suit before Justice Allen constituted an attack on the award of the land commission and that the decree in that suit amounted to a setting aside of the award." Record, p. 99.

"The theory upon which the suit proceeded and the object aimed at preclude the notion that it was desired to have the award to Kinimaka set aside or annulled. The upholding of the award was essential to the success of Kalakaua's suit. To attack and set aside the award would have been to take from Kinimaka's representatives the very title which the complainant was seeking to compel them to convey to him." Record, p. 98.

This is a quibble on the meaning of the word "attack." While Kalakaua's bill did not seek to have the award declared void and a new award made to Kalakaua as that remedy was not available in equity, still it was an attack on the validity and effect of the award. It differed from an appeal in the form of the remedy asked, not by being any less an attack. It set up facts which might have been set up before the Board of Commissioners to Quiet Land Titles and which, if set up, and believed, might have caused a different award. That Kaniu owned the land claimed, not Liliha, and that it passed by will of Kaniu to Kalakaua, not to Kinimaka, and that Kaniu directed Kinimaka to care for the land for Kalakaua, are the facts on which all claim of Kalakaua for a

mandatory injunction rested. He had no case in equity which would not have been equally effective if offered to the Land Commission. He introduced in evidence not merely the award, but the evidence so far as recorded in the proceedings before the Land Commission as to one lot of L. C. A. 129 (Record, p. 24), and to discredit this and the proceedings generally, put in the testimony of the secretary of the commission that no other testimony was given in regard to those lots and that the award of Onoulimaloo was based on the Mahele without any citation of witnesses and that the Commission was accustomed after the notification in the newspaper to allow claims if no counter claimants appeared; and further attacked the proceedings by the evidence of two servants as to one lot, perhaps this one, that it belonged to David and not Kinimaka (Record, pp. 24-5), and by the evidence of C. Kanaina that Kaniu owned Onoulimaloo and that Kinimaka got it at the Mahele because he appeared for her and her heirs. (Record, p. 23.)

In *Kapiolani Estate v. Atcherley,* 14 Haw. 661, the Supreme Court of Hawaii held that "a collateral *attack* on a judicial proceeding is an attempt to avoid, defeat, or evade it, or to deny its force and effect in some manner not provided by law." Surely to claim that the award was wrong is to attack it; to make the awardee's heirs convey the land is to attack its effect. The effect of the award was to give the awardee the land, to convert him into a trustee is to attack that effect.

In the Lewers and Cooke case both the Hawaii court and this thoroughly understood that the case was an equitable one making an attack in equity on

a judgment because of constructive fraud arising out of fiduciary relations between a ward and guardian.

The headnote in the Lewers and Cooke case in 18 Haw. 626 begins: "Upon a bill alleging breach of fiduciary duty in the obtaining of a land commission award." That Kalakaua was 8 years old when Kaniu died is mentioned in 18 Haw. 629, and no other fiduciary relationship than guardianship has been suggested by appellee. In 18 Haw. 638 the Hawaii Supreme Court said:

"The decisions cited appear sufficient to sustain the contention that none of the grounds alleged in David Kalakaua's petition, including fraud and infancy, were sufficient to warrant the court in reviewing, in a collateral proceeding, the award of the land commission."

Actual fraud is generally considered more heinous than constructive fraud. The Hawaii court held that it was immaterial whether Kaniu owned an interest or not, or whether Kinimaka was guilty of either actual or constructive fraud in saying (18 Haw. 638):

"It is immaterial whether Kinamaka had received the land from Liliha or from Kaniu, and whether, if from Kaniu, he was guilty of actual fraud in procuring his land commission award or whether he acted under the honest belief that the disapproval of Kaniu's will by the king and the verbal giving of the lands to him was conclusive."

In thus deciding that actual fraud in obtaining the award was immaterial it was unnecessary to consider constructive fraud.

Appellee has suggested no other fiduciary relationship of Kinimaka and no fraud except such as arose from a relation of guardianship.

This court understood clearly the nature of the case and used the word 'attack" in the same connection. It was in no way misled by the word "attack" to think that something else was referred to than an attempt in equity to force defendant, because of Kinimaka's alleged guardianship, to convey by the usual equitable forms of remedy in cases of relief against judgments obtained by fraud. In its opinion this court said in *Lewers and Cooke v. Atcherley,* 222 U. S. 292-4:

"In 1849 the Land Commission adjudged the land to Kinimaka in fee simple. In 1856 * * * Kalakaua filed a *bill in equity* * * * to establish a *trust against* Kinimaka * * * In 1858 he * * * brought another *bill against* the widow and *guardian* of the minor children of Kinimaka * * * which ended in a *decree that the guardian convey the premises* to Kalakaua. The decision now appealed from held (18 Haw. 632) that the appellant in seeking to register a title depending upon the unexecuted *decree* in Kalakaua v. Pai and Armstrong is, as *against* the holder of the outstanding title, in the same position as a party asking the aid of a court of *chancery* in executing a former *decree* * * * the Supreme Court came to the conclusion that the adjudication of the Land Commission in 1849 bound *all* interests and that the *decree* of 1858 was wrong. * * * The real foundation of settled titles seems to have been the establishment of the Land Commission in 1845. *Thurston v. Bishop,* 7 Hawaii 421, 428. When the Supreme Court of Hawaii repeats what it has been saying for many years that the decisions of that Board could not be *attacked* except by a direct appeal to the Supreme Court provided by law no imperfect analogy such as that of patents issued by our Land Department is sufficient to overthrow the tradition fortified as it is by logic and good sense."

These land patent cases which Lewers and Cooke had brought to the attention of the U. S. Supreme Court were all cases in equity. In none of them was a patent cancelled and a new one issued, but in every one, the holder of the patent was declared a trustee and ordered to convey. The "attack" was of the same nature precisely as the attack on the award in the suit of *Kalakaua v. Pai and Armstrong.*

Ringo v. Binns, 10 Pet. 269; *Lewers & Cooke v. Atcherley,* 222 U. S. 287.

Massie v. Watts, 6 Cranch 148; *Lewers & Cooke v. Atcherley,* 222 U. S. 287.

Meader v. Norton, 11 Wall. 442; *Lewers & Cooke v. Atcherley,* 222 U. S. 288.

Felix v. Patrick, 145 U. S. 317, 328; *Lewers & Cooke v. Atcherley,* 222 U. S. 288.

Bernier v. Bernier, 147 U. S. 242; *Lewers & Cooke v. Atcherley,* 222 U. S. 288.

Bockfinger v. Foster, 190 U. S. 116; *Lewers & Cooke v. Atcherley,* 222 U. S. 288.

Widdicombe v. Childers, 124 U. S. 400; *Lewers & Cooke v. Atcherley,* 222 U. S. 288.

Sanford v. Sanford, 139 U. S. 642; *Lewers & Cooke v. Atcherley,* 222 U. S. 288.

The eight-page petition for rehearing in the Lewers and Cooke case presented to this court was devoted entirely to this matter of guardianship.

THE RULE OF THE "LAW OF THE CASE" IS NOT INVOLVED HERE.

The fifth assignment of error is erroneous in its reference to the decision of the court below which did not hold that it could not follow the law of the case. It held that the law of the case was not in-

volved. The only reference in the decision appealed from, to the law of the case, is as follows:

"The Lewers and Cooke case, however, was decided on a point which was not touched upon in the decision on the demurrer in the present case and although it was held in that case that the decree of 1858 ought not to be enforced the decision rested upon ground which was not inconsistent with that taken in the prior decision in the case at bar. The rule of the law of the case, therefore, does not, as counsel have supposed, compel the choice of following one of two conflicting decisions. We think the application of the rule is not involved here." Record, p. 100.

The right to make the very decision and decree appealed from was settled in the Lewers and Cooke case, where this court said:

"The decree overruling the demurrer of the defendant to the bill of the Kapiolani Estate also is relied upon. But as that case has not passed to a final decree, and the appellant bought the land in controversy *pendente lite,* it can stand no better than its vendor, the party to the suit. * * * If that case instead of this had been prosecuted to final decree there was nothing in its former action to hinder the Supreme Court from adopting the principle now laid down, even though it thereby should overrule an interlocutory decision previously reached. *King v. West Virginia,* 216 U. S. 92, 100, 101."

Lewers and Cooke v. Atcherley, 222 U. S. 285, 295.

The Act of Congress of March 3, 1905, extending right of appeal to all cases involving $5000.00 affected pending litigation.

Wm. W. Bierce, Ltd., v. Waterhouse, 219 U. S. 320, 337.

2 Cyc. 520.

Aside from this a demurrer is an interlocutory decision and not such a final adjudication that the court may not reconsider its action and enter a contrary order, nor decide the same matter differently when subsequently presented again in the same case.

Hutz v. Woodman, 218 U. S. 205, 212.
King v. West Virginia, 216 U. S. 92, 100.
31 Cyc. 350.
Great Western Telegraph Co. v. Burnham, 162 U. S. 339, 341.
Hamilton v. Marks, 63 Mo. 167, 172.
Jungk v. Read, 12 Utah 292.
Reeves v. Petty, 44 Tex. 249, 254.
Norton v. Knapp, 64 Ia. 112, 115.
Hastings v. Foxworthy, 45 Neb. 676, 697.
Penn. Co. v. Platt, 47 Ohio 366, 379.

Further, the local court, in deciding itself not bound by a decision on demurrer, in so far as that is a decision that it is not bound by the law of the case, has decided a question of practice that it should be allowed to decide for itself.

THE COURT BELOW WAS ALSO RIGHT IN FOLLOWING THE LEWERS AND COOKE CASE BECAUSE OF THE PECULIAR RELATION OF APPELLANT TO THAT CASE WHICH MAKES THAT CASE BINDING ON APPELLANT BECAUSE OF APPELLANT'S LACHES, PRESENT LACK OF INTEREST IN THE CASE AND *RES JUDICATA.*

THE STATUS OF THE LEWERS AND COOKE CASE IS THAT OF A PRIOR CASE BECAUSE JUDGMENT WAS FIRST REACHED IN IT.

23 Cyc. 1113.
1 Van Fleet Former Adj. 87, Sec. 9.

KAPIOLANI ESTATE, LIMITED, IS BARRED BY LACHES FROM ANY STANDING IN EQUITY.

Kapiolani Estate, Ltd., had notice of the Lewers and Cooke litigation. Its vice president, C. W. Ashford, appeared at the trial and assisted in the conduct of the case, examining three witnesses at request of John F. Colburn, treasurer of appellant, who was the officer who in the regular course of business employed attorneys for it and who was also personally a witness for Lewers and Cooke, Ltd., at the trial. Kinney, Marx, Prosser & Anderson, then attorneys for appellant in this case, were retained by appellant through said John F. Colburn, its treasurer, to appear for Lewers and Cooke, Ltd., at two hearings before the Supreme Court of Hawaii (19 Haw. 51, 334) and did so, and on such retainer also signed the assignment of errors on the appeal to this court in that case. (Record, p. 117.) This John F. Colburn is also the official who, representing Kapiolani Estate, signed the sworn petition in this case (Record, p. 9), and he also signed the deeds of Kapiolani Estate to Lewers and Cooke. (Record, pp. 74-5.)

Having all this notice, during the six years eight months from May 29, 1905, when the land was sold to Lewers and Cooke, Ltd., until February 20, 1912, when Mary H. Atcherley by her supplemental answer compelled action in this case, Kapiolani Estate, who might easily have pushed this case to a finish before the Lewers and Cooke case, lay idle, doing nothing in this case but assisting in the other. It was responsible for the other, having sold when it knew it had no legal title and could at most convey an equitable one. It was selling a lawsuit and knew then that

Lewers and Cooke to get title must get it established by legal proceedings. Instead of making Lewers and Cooke a party to this action and thus preventing a multiplicity of suits, it chose to wait and speculate on the decision in the Lewers and Cooke case and should now, at this late day, abide by that decision and not be allowed to seek a new one.

APPELLANT, HAVING SOLD ALL EQUITABLE TITLE IN THE LAND TO LEWERS AND COOKE, LTD., HAS NO EQUITABLE INTEREST IN THE SUBJECT MATTER TO SUSTAIN THIS SUIT.

At the time of the sale to Lewers and Cooke this suit was pending in which petitioner by bill sworn to by one of the very officers who was signing the deeds of conveyance, had admitted having no legal title.

"Plaintiff's record of chain of title from the deceased to him by virtue of the above mentioned decree, through which plaintiff claimed, is incomplete."
"defendant is using the fact that the legal title to said land is in her as aforesaid to harass plaintiff."
"it would be inequitable to allow the present defendant to prosecute her action of ejectment until the bare legal title to the property in question which she is holding wrongfully, and against the right of the petitioner, and as naked trustee thereof, should by her be conveyed to said petitioner."
Record, p. 8.

Kapiolani Estate, Ltd., then, had nothing to convey except the right to establish title in equity, either by such a suit as this or by an action in the Court of Land Registration where the same equitable claim could be presented, and it could not con-

sistently sell that right and keep it too. Equity which abhors a multiplicity of suits does not contemplate separate suits by grantor and grantee on exactly the same equitable title.

Dick v. Foraker, 155 U. S. 414:

"The rule in ejectment is that the plaintiff must recover on the strength of his own title and not on the weakness of the title of his adversary. A like rule obtains in an equitable action to remove a cloud from a title, and title in the complainant is of the essence of the right to relief."

ibid, p. 416:

"the equally unsound premise that one having no title can successfully invoke the aid of a court of equity to remove a cloud from such non-existent title; that is to say, can ask a court to subtract something from nothing."

Bissell v. Kellogg, 60 Barb. 617, 629:

A party whose only interest is that he has given a covenant of warranty cannot be embarrassed or inconvenienced by the existence of a cloud.

Chapman v. Jones, 47 N. E. 1065, 149 Ind. 437-8:

A grantor by warranty deed may not bring suit to remove a cloud and so protect his warranty. He is not a party in interest.

Smith v. Brittenham, 109 Ill. 549, 550:

"No one * * * can maintain a suit in chancery with respect to real estate to which he has neither the legal nor equitable title. * * * If such an interest in the complainant is indispensable to the commencement of the suit, as will be conceded, the conclusion would seem to follow that where a party having such interest commences a suit and before any hearing or disposition of the cause upon the

merits voluntarily transfers all his interest to another and the same is made to appear of record, as is the case here, the whole proceeding will become so defective for want of proper parties, that no valid decree can be entered in the case until the complainant's assignee by supplemental bill, or otherwise, makes himself a party complainant to the suit."

(There were covenants of warranty in this case.)

Glos v. Goodrich, 175 Ill. 25:

"The averment in the bill shows an actual sale by the appellee and delivery of possession to her grantee, who is alleged to be in possession. She has no interest, legal or equitable."

Page Co. v. B. & M. R. R., 40 Ia. 525:

Grantor may not bring suit to quiet title.

Gilbert v. Cooley, Walk. Ch. (Mich.) 494:

After irregular foreclosure and sale, mortgagee has no interest in mortgage or premises and may not bring new foreclosure suit.

Huntington v. Allen, 44 Miss. 654:

Vendor cannot maintain suit to remove a cloud on title to land in which he has no interest.

Hutchinson v. Howe, 100 Ill. 19:

Unless a party shows title to land in himself, it is not for him to complain there is a cloud upon it. He must have a title to the land to give him a standing in court before he can contest a cloud upon the title, whether it is created by an incumbrance or an adverse title.

Some courts have held that a warrantor has sufficient interest in the question, though he has none in the land, to bring suit to clear title or to prevent a cloud, but none that he can do so after the grantee has already brought suit and had final decree en-

tered against him. A warrantor's suit must be timely and generally the vendee joined as a party plaintiff or defendant.

A multiplicity of suits is against the principles of equity. If this suit be allowed, a separate one might be brought by every grantor in a chain of title who might be injured by a decree against his grantee, each waiting until the conclusion of the suit of his grantee.

It is contrary to the policy of the law to allow the same question to be separately litigated by every person interested in it. Suppose a suit had been brought by one of these mortgagors alone for the amendment of this mortgage and when that failed, suits had been brought by each one of them successively, would it be contended that they ought to be entertained by the courts?

Albert v. Hamilton, 25 Atl. 343.

Parties having a common cause of action can not divide it up so as to enable each to bring a separate action upon it and thus annoy a defendant with several suits.

Roby v. Eggers, 130 Ind. 424.

THE LEWERS AND COOKE DECREE SHOULD BE FOLLOWED IN THIS CASE BECAUSE IT IS *RES JUDICATA.*

Kapiolani Estate was not a party in name in that case but was one by representation, being represented by its grantee, for when Lewers and Cooke, Ltd., brought suit to register its title it represented all who claim only by virtue of the ownership of Lewers and Cooke, Ltd.

For since the making of its deeds Kapiolani Estate, Ltd., has had no interest in the land (*McCandless v. Castle,* 19 Haw. 515). Its interest due to warranty is contractual and arises from a contract with which Mary H. Atcherley has nothing to do. Kapiolani Estate, Ltd., is as much an outsider as though it were a title guarantee company. Its interest in this case rests on the title of Lewers and Cooke, Ltd., not its own.

Spear v. Hill, 54 N. H. 89:

"The defendant sets up no title in himself to the property. He sets up title in Joseph G. Hill, and justifies solely under that title. * * * He thus identified himself in interest with Joseph G. Hill, and merged his legal personality in that of Joseph."

ibid, p. 90:

"It would be an intolerable hardship on this plaintiff to allow the defendant to assert in the right of Joseph G. Hill, a title which Joseph G. Hill himself is conclusively estopped from asserting. Joseph G. Hill has already unsuccessfully litigated this title against the plaintiff. When he was heard, all who claimed to justify their acts in reference to the property by virtue of his authority and ownership (and not on account of any separate right in themselves) were heard."

Bierce v. Waterhouse, 219 U. S. 334, 335.

One who becomes surety for the performance of the judgment of a court in a pending case is represented by his principal and is bound by the judgment against his principal within the limits of his obligation.

Leslie v. Bonte, 130 Ill. 498:

The payee having by his indorsement authorized

his assignee to sue upon the note, is bound by the judgment against the assignee upon the merits.

(So also *Soward v. Coppage,* 9 S. W. 389.)

Pace v. Maxwell, 62 Ga. 98:

"If Stokes could not protect his title to the land derived from Pace from the plaintiff's judgment, neither can Pace, the present claimant, inasmuch as he has no better title against plaintiff's judgment than he conveyed to Stokes."

Chew v. Brumagen, 13 Wall. 497, 505:

A mortgagee assigned the mortgage and mortgage bond as collateral security. The assignee sued and recovered only part. Held that "By his assignment he substituted Wood in his place to demand and receive payment of the bond, and agreed to look to Wood for what remained after his notes were satisfied," that the assignee was trustee of an express trust and the mortgagee was represented by the trustee and bound by the judgment recovered by him.

Lovejoy v. Murray, 3 Wall. 1, 18-19:

A plaintiff in attachment had indemnified the sheriff, had notice of a case against the sheriff and actually conducted the defense though not a party. Held he was represented by the sheriff and bound by the judgment.

(So also *Tootle v. Coleman,* 57 L. R. A. 120, 124-5; 46 C. C. A. 132.)

Greenleaf on Evidence, Vol. 1, Secs. 522-3:

The ground, therefore, upon which persons standing in relation to the litigating party are bound by the proceedings to which he was a party is, that they are identified with him in interest.

Should Kapiolani Estate, Ltd., now repurchase from Lewers and Cooke, Ltd., it would but be again in the same situation originally alleged in the bill in this case, owning the equity on which the bill rests. But it would be a grantee and privy of Lewers and Cooke, Ltd., and bound by the judgment against Lewers and Cooke, Ltd. This indicates the substantial change in the facts from those originally stated in the bill. In this suit, which rests on the title of Lewers and Cooke, Ltd., and seeks to give that corporation a legal title which it is estopped by judgment from seeking for itself, equity, which looks at the real parties in interest, should view Kapiolani Estate, Ltd., as a privy of Lewers and Cooke, Ltd., and bound by the judgment.

The Lewers and Cooke decree is also *res judicata* here because a suit in the Court of Land Registration is a suit in rem and binds all the world, i. e., all who have or claim any interest in the subject matter. This includes those who have indirect interest.

23 Cyc. 1406:

"A judgment in rem, as distinguished from a judgment in personam, is an adjudication pronounced upon the status of some particular thing or subject matter, being the subject of controversy, by a competent tribunal, and having the effect of binding all persons having interests, whether joined as parties to the proceeding or not."

Revised Laws of Hawaii, Sec. 2395:

"The proceedings upon such applications shall be proceedings in rem against the land, and the decrees shall operate directly on the land and vest and establish title thereto."

Paahao v. Swinton, 20 Haw. 355:
Court of Land Registration decree avails against all the world.

If Mary H. Atcherley had brought suit and registered her title, not only Lewers and Cooke, who litigated, but its warrantor would be bound. The decree was not to register, but that Lewers and Cooke, the petitioner, had no title, legal or equitable, and was not entitled to register. It does not completely declare the status of the *res* by decreeing who is the owner, but it does partly declare the status, i. e., the land is not subject to any rights, legal or equitable, in Lewers and Cooke, Ltd. The world was notified of this claim. The court had theoretical possession of the *res,* and therefore Kapiolani Estate, Ltd., grantor and warrantor of the title of Lewers and Cooke, Ltd., is bound and can not bring another suit in the Court of Land Registration to register the title of Lewers and Cooke, Ltd., and thus protect itself from damage because of its warranty or prior possession.

The same bar should hold against an equity suit which is the equivalent of a suit by Kapiolani Estate, Ltd., to register the title of Lewers and Cooke, for though the relief prayed here is a conveyance to Kapiolani Estate, such a conveyance would at once enure to Lewers and Cooke.

The Appollon, 22 U. S. (9 Wheat.) 362:
"A decree of acquittal in a proceeding in rem without a probable cause of seizure, and not appealed from with effect, is conclusive, in every inquiry before any other court, that there was no justifiable cause of seizure."

THE ORIGINAL TENURE OF HAWAII FROM THE TIME KAMEHAMEHA FIRST ESTABLISHED THE MONARCHY TO 1839 WAS FEUDAL, AND A DESPOTISM. THE KING AND EACH OVERLORD UNDER HIM HAD ABSOLUTE OWNERSHIP AND CONTROL OF THE LAND AND PEOPLE UNDER HIM.

When the islands were conquered by Kamehameha I he followed the example of his predecessors and divided out the lands among his principal warrior chiefs, retaining, however, a portion in his hands, to be cultivated by his own immediate servants or attendants. Each principal chief divided his own lands anew, and gave them out to an inferior order of chiefs, or persons of rank, by whom they were subdivided again and again; after passing through the hands of four, five or six persons, from the King down to the lowest class of tenants * * *

The tenures were in one sense feudal, but they were not military, for the claims of the superior on the inferior were mainly either for produce of the land or for labor, military service being rarely or never required of the lower orders. All persons possessing landed property, whether superior landlords, tenants or subtenants, owed and paid to the King not only a land tax, which he assessed at pleasure, but also service which was called for at discretion, on all the grades from the highest down. * * * They owed obedience at all times * * *

The same rights which the King possessed over the superior landlords and all over them, the several grades of landlords possessed over their inferiors * * * The superior always had the power at pleasure to dispossess his inferior, but it was not

considered just and right to do it without cause, and dispossession did not often take place, except on the decease of one of the landlords when changes were often numerous, and the rights of heirs and tenants comparatively disregarded, for the purpose of favoring a new class of persons."

Principles adopted by Board of Commissioners to Quiet Land Titles in 1846. Revised Laws of Hawaii, p. 1179.

(Enacted as law in 1846. Revised Laws of Hawaii, p. 1179.)

"Formerly if the landlord became dissatisfied, he at once dispossessed his tenant, even without cause, and then gave his land to whomsoever asked for it.

"Formerly, if the King wished for the property of any man, he took it without reward; even seized it by force, or took a portion only, just in accordance with his choice, and no man could refuse him. The same was true of every chief, and even the landlords treated their tenants thus."

Laws of 1842 (of Hawaii), Ch. LIV.

THE CONSTITUTION OF 1839 AND LAWS DOWN TO ESTABLISHMENT OF THE BOARD OF COMMISSIONERS TO QUIET LAND TITLES IN 1845 GAVE PROTECTION TO INTERESTS IN LAND BUT THOSE INTERESTS WERE STILL FEUDAL, LARGELY UNDEFINED, AND THE REMEDY FOR WRONGFUL DISPOSSESSION OF AN HEIR WAS PAYMENT OF DAMAGES, NOT RETURN OF THE LAND.

Constitution granted by Kamehameha III in 1839 and printed in 1840:

"Protection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property, while they con-

form to the laws of the kingdom, and nothing whatever shall be taken from any individual except by express provision of the laws."

"The origin of the present government, and system of polity, is as follows: Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property. Wherefore, there was not formerly, and is not now any person who could or can convey away the smallest portion of land without the consent of the one who had, or has the direction of the kingdom."

"These are the persons who have had the direction of it from that time down: Kamehameha II, Kaahumanu I, and at the present time Kamehameha III. These persons have had the direction of the kingdom down to the present time, and all documents written by them, and no others are the documents of the kingdom."

"The prerogatives of the King are as follows:

"He shall be the chief judge of the Supreme Court, and it shall be his duty to execute the laws of the land, also all decrees and treaties with other countries, all however in accordance with the laws."

First Laws of Hawaii, published in 1842 and called "Old Laws" or "Blue Laws":

Ch. III, Sec. 8.

"It is furthermore recommended that if a landlord perceive a considerable portion of his land to be unoccupied, or uncultivated and yet is suitable for cultivation, but is in possession of a single man, that the landlord divide out that land equally between all his tenants. And if they are unable to cultivate the whole, then the landlord may take possession for himself and seek new tenants at his discretion."

Ch. III, Sec. 11.

"Ye landlords, to whom lands are given in charge, no longer rule your tenants in ignorance, lest the tax officers being enlightened in the principles of this book nullify your title as landlord, and we give the lands to those who are ready to aid the feeble portions of the community. The ignorant shall receive their proper reward, poverty, and the lands shall be given to other lords."

Ch. III, Sec. 14.

"If any one spoken of in this law seize the land of lawful heirs, which is protected by this law, the punishment shall be as follows: two-thirds of the income of said land obtained by the new landlord in a year shall be delivered to the heir, and it shall be thus delivered each year for four successive years, and then the land shall belong to the new landlord.

"From this time forth, the King and his Premier must be informed of all bequests of land, and whatever relates to the heirs. But if the deceased have no heir at all then his land and all his property shall be the King's."

Ch. XXI, Sec. 8.

"When the parent dies, then the child is the heir, if there be any child living. The parent during his life time may sell his personal estate to whomsoever he pleases. But the land and all fixed property on the land shall descend to the child. If he have many children, they shall all inherit it together. Though if the parent while he is living and in sound mind make a written will, he may bequeath his land to whom he pleases. When he dies the heir shall exhibit the will to the King, and if the Supreme Judges perceive that there was a real fault in the will, they shall correct it, lest those to whom the property justly belongs should be left destitute, and those possess the property to whom it does not belong."

This law gave the judges of whom the King was the chief justice power to change wills in accordance with their own ideas of propriety.

Ch. XLVIII.

"Whoever contracts a debt, he alone shall be liable for the debt, and his property alone shall go for the payment of it. And lest there should be mistaken opinions as to what kind of property may be seized for the payment of debts, it is hereby clearly proclaimed that lands and fixed property upon them can never be sold at auction, neither can they be permanently transferred. They can not even be leased for years without the consent of the King and Premier. This kind of property therefore can never be seized for debt, for the Government has never relinquished its right to the soil. But nevertheless, if a man have no personal estate, the land and fixed property upon it may be sold at auction on this condition, that no person can be the purchaser except a native born citizen; and the right of him who purchases in this manner shall be the same as the right of other natives to their lands."

Ch. LIV.

"1. If a farm be seen to be grown over with weeds and food upon it, and yet a good farm for cultivation, in such a case, the tenant shall be dispossessed, though he shall not be dispossessed without a trial, nor at the mere suggestion of his landlord. The criminal person shall be dispossessed, whether it be the landlord or the tenant.

"2. Furthermore, forbearance shall be exercised for one year more, and then if the idleness of the people continues, it shall be the duty of the tax officer whenever he sees a man sitting idle, or doing nothing on the free days of the people, to take that man and set him at work for the Government and he shall work till night.

"The landlords also may do the same with the

tenants of their lands when they are idle. This law is passed on account of the idleness of the people on their own free days. While they are at work for themselves, they shall not be set to work for others."

THE AWARDS OF THE BOARD OF COMMISSIONERS TO QUIET LAND TITLES CREATED FEE SIMPLE TITLES FOR THE FIRST TIME; DID AWAY WITH FEUDAL TENURE AND SETTLED FOREVER ALL CLAIMS TO LANDS ARISING PRIOR TO DECEMBER 10, 1845.

An Act to Organize the Executive Departments of the Hawaiian Islands. Part I, Ch. VII, Art. IV. Of the Board of Commissioners to Quiet Land Titles.

Sec. I, Revised Laws of Hawaii, p. 1160.

"His Majesty shall appoint * * * five commissioners, one of whom shall be the attorney general of this kingdom, to be a board for the investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any landed property acquired anterior to the passage of this act (Dec. 10, 1845); the awards of which board, unless appealed from as hereinafter allowed, shall be binding upon the minister of the interior and upon the applicant."

Sec. II, Revised Laws of Hawaii, p. 1161.

"The said commissioners shall, before acting, take and subscribe an oath to be administered to them by the minister of the interior, in the following form:

"We and each of us do solemnly swear that we will carefully and impartially investigate all claims to land submitted to us by private parties against the government of the Hawaiian Islands; and that we will equitably adjudge upon the title, tenure, duration and quantity thereof, according to the terms of article fourth of the seventh chapter of the first part of an act entitled 'An Act to organize the executive departments of the Hawaian Islands.'"

Sec. V, Revised Laws of Hawaii, p. 1162.

"It shall be the special duty of said board to advertise in the Polynesian newspaper, during the continuance of their sessions the following public notice, viz.:

"'To all Claimants of Land in the Hawaiian Islands:—The undersigned have been appointed by His Majesty the king, a board of commissioners to investigate and confirm or reject all claims to land arising previously to the.....day of....., 18.... Patents in fee simple, or leases for terms of years, will be issued to those entitled to the same, upon the report which we are authorized to make by the testimony to be presented to us.

"'The board holds its stated meetings weekly at .....in Honolulu, island of Oahu, to hear the parties or their counsel, in defense of their claims; and is prepared, every day, to receive in writing, the claims and evidences of title which parties may have to offer, at the.....in Honolulu, between the hours of 9 o'clock A. M. and 3 o'clock P. M.

"'All persons are required to file with the board specifications of their claims to land, and to adduce the evidence upon which they claim title to any land in the Hawaiian Islands, before the expiration of two years from date, or in default of so doing they will after that time be forever barred of all right to recover the same, in the courts of justice.

"'Dated.....day of....., 18....'"

Sec. VII, Revised Laws, p. 1163.

"The decisions of said board shall be in accordance with the principles established by the civil code of this kingdom in regard to prescription, occupancy, fixtures, native usages in regard to landed tenures, water privileges and rights of piscary, the rights of women, the rights of absentees, tenancy and subtenancy, primogeniture and rights of adoption; which decisions being of a majority in number of said board, shall be only subject to appeal to the

supreme court, as prescribed in the act to organize the judiciary, and when such appeal shall not have been taken, they shall be final."

Sec. VIII, Revised Laws of Hawaii, p. 1163.

"All claims to land, as against the Hawaiian government, which are not presented to said board within the time, at the place and in the manner prescribed in the notice required to be given in the fifth section of this article, shall be deemed to be invalid, and shall be forever barred in law, unless the claimant be absent from this kingdom, and have no representative therein."

Sec. XIII, Revised Laws of Hawaii, p. 1164.

"The titles of all lands claimed of the Hawaiian government anterior to the passage of this act, upon being confirmed as aforesaid, in whole or in part by the board of commissioners, shall be deemed to be forever settled, as awarded by said board, unless appeal be taken to the supreme court, as already provided. And all claims rejected by said board, unless appeal be taken as aforesaid, shall be deemed to be forever barred and foreclosed, from the expiration of the time allowed for such appeal."

Principles adopted by the Board of Commissioners to Quiet Land Titles August 20, 1846, and approved by the legislature October 20, 1846. Revised Laws of Hawaii, p. 1179.

Revised Laws of Hawaii, p. 1168.

"It being therefore fully established that there are but three classes of persons having vested rights in the land—1st, the government, 2nd, the landlord, and 3rd, the tenant, it next becomes necessary to ascertain the proportional rights of each * * * Ancient practice, according to testimony seems to have awarded to the tenant less than justice and equity would demand, and to have given to the King more than the permanent good of his subjects would

allow. If the King be disposed voluntarily to yield to the tenant a portion of what practice has given to himself he most assuredly has a right to do it; and should the King allow to the landlord one third, to the tenant one third, and retain one third himself, he, according to the uniform opinion of the witnesses, would injure no one unless himself; * * *

"It is altogether probable that since the act of 1839, a few individuals may have acquired allodial ownership of landed property, either by purchase or by voluntary grant on the part of the King. Such ownership must be proved or it cannot be acknowledged; for the King, representing the government, having formerly been the sole owner of all the soil, he must be considered to be so still, unless proof be rendered to the contrary; and even possession of ever so long standing cannot be proof, any thing more than that which is specified above as belonging to the landlord, or to the landlord and tenant as the case may be."

Revised Laws of Hawaii, p. 1168.

"Mere building lots were never bestowed by the King or lords for the purpose of being given out to tenants, as was uniformly the case with lands suitable for cultivation. It follows, therefore, that (with some exceptions, which in all cases must be proved), in relation to building lots, there is no third class of persons having the rights of lords over tenants."

Revised Laws of Hawaii, pp. 1168-9.

"Although the above facts, and principles are most perfectly clear and unquestionable, yet great evils have existed down to the present moment, owing mainly to the circumstance that several different classes of persons had undivided rights in the same lands, and each class was very liable to claim more than the due proportions. In such cases, lords, or persons of superior power or rank have generally been the oppressors, and perhaps there are none of

those classes, from the throne down, who have not sometimes taken advantage of the powerless in this respect. Neither the laws of 1839 nor of 1840 were found adequate to protect the inferior lords and tenants, for although the violators of law of every rank were liable to its penalty, yet it was so contrary to ancient usage, to execute the law on the powerful for the protection of the weak, that the latter often suffered, and it was found necessary to adopt a new system for ascertaining rights, and new measures for protecting those rights when ascertained, and to accomplish this object the Land Commission was formed.

"The decisions of an executive board would be so far surrenders of the Chief Executive Magistrate, who has approved the powers conferred upon that Board, as to be an authorization from him to adjust all the past tenures in the manner most equitable, and if abstractly just, power to alienate for him any rights, which he as King could surrender in regard to these lands. The whole power of the King to confer and convey lands to which private equitable claim now attaches, is reposed in the commission. What is the nature and extent of that power which the King has bestowed upon this board? It can be no other than his private or feudatory right as an individual participant in the ownership, not his sovereign prerogatives as head of the nation * * *"

Revised Laws of Hawaii, p. 1171.

"The Hawaiian rulers have learned by experience that regard must be had to the immutable law of property, in things real, as lands, and in things personal, as chattels; that the well being of their country must essentially depend upon the proper development of their internal resources, of which land is the principal; and that in order to its proper cultivation and improvement, the holder must have some stake in it more solid than the bare permission to evolve his daily bread from an article to which he and his children can lay no intrinsic claim. They

perceive by contact with foreign nations that such is their uniform practice, and that the rules of right under that practice are contended for, understood and likely to be applied, in regard to the lands otherwise held at their hands by a tenancy incomprehensible to the foreigner. They are desirous to conform themselves in the main to such a civilized state of things now that they have come to be a nation in the understanding of older and more enlightened governments.

"Such we the commissioners understand to have been the reason of the distinction in the Constitution of 1840, between government lands and private lands of the King, and such we now understand to be the spirit of article 4th, chapter 7th, of the first part of the Act to organize the executive departments of the Hawaiian Islands, founded upon the Law Report of May 21, 1845, in which it was recommended to prepare His Majesty's government to consort in some measures with the recognizing powers. In consequence, it was enacted that the King is to appoint five commissioners for quieting land titles, and thus confer upon them all his private and public power over the corporate property in lands claimed by private parties, which in the nature of things he can delegate."

Revised Laws, p. 1175.

"A wide latitude is thus left to the Commissioners, who must, in passing upon the merits of each claim, first elicit from credible witnesses, the fact or history of each; and thus assort or reconcile those facts to the provisions of the civil code, whenever there is a principle in past legislation applicable to the point under consideration; but when no such principle exists, they may judicially declare one, in accordance with ancient usage and not at conflict with any existing law, nor at variance with the facts, and altogether equitable and liberal."

Revised Laws of Hawaii, p. 1176.

The following benefits will result from these investigations and awards:—

"1st. They will separate the rights of the King and Government, hitherto blended, and leave the owner, whether in fee, or for life, or for years, to the free agency and independent proprietorship of his lands as confirmed."

Revised Laws of Hawaii, p. 1177.

"2nd. The patents or leases given to claimants are for certain fixed and ascertained extents or dimensions of land. This must prevent after litigation in regard to boundaries. All parties having been cited before awarding, there can be no counter claims to the same piece of land after award, except by a party who has presented his claims to the Board.

"The patents and leases are recorded in duplicate, in the Department of the Interior. This will enable the foundation of every one's right to be known to the Government and inquiring parties. No pretended ownership can exist without the means of undeceiving the public in regard to them. Subsequent purchasers and mortgagees need not be in ignorance of prior defects in the title, or of prior incumbrances.

"The undersigned deem the foregoing prefatory remarks and explanations necessary to a clear understanding of the awards upon which they are about to enter, and indispensable to which awards, it is necessary to lay down the following general principles, to which they have arrived by critical study of the civil code, and careful examination of numerous witnesses; * * *

"1st. For the purposes of this Board in all cases where the land has been obtained from the King or his authorized agent without a written voucher, anterior to the 7th of June, 1839, the Board will inquire simply into the history of the derivation; and if the land claimed has been continuously occupied, built

upon, or otherwise improved since that time, without molestation, the Board will, in case no contests exist between private claimants, infer a freehold less than allodial.

"2nd. In all such cases as above specified, when there are counter claims to the piece of land, the Board will confine their inquiry to which of the claimants has the freehold, less than the allodial.

"3rd. In all cases where the land has been obtained from the King or his authorized agent, or from any governor, chief, or pretended proprietor, subsequent to the 7th of June, 1839, the Board will strictly inquire into the right of the King, or chief, or landlord, to make such disposition of the land; and will confirm or reject, according to the right of such donor, grantor, or lessor, regardless of consideration, occupancy or after improvement."

In organizing a judiciary department with courts that had full equity powers, care was taken not to impair the plenary jurisdiction of the Board of Commissioners to Quiet Land Titles.

"Provided always, that nothing herein contained shall be so construed as to interfere with the rights and jurisdiction of the Board of Commissioners to Quiet Land Titles."

Third Act of Kamehameha III. An Act to organize the Judiciary Department of the Hawaiian Islands, Ch. I, Sec. III, p. 4.

These statutes created the Board of Commissioners to Quiet Land Titles as a court of exclusive jurisdiction over claims to land with extraordinary powers. It had equity jurisdiction, could create principles of law where none existed to fit a case. All suits were in rem and defendants were summoned by publication without being named. The court makes reference to former wrongs on tenants in its declaration of principles and makes it clear that its deci-

sions shall be final. It clearly had power to consider whether a failure of the King to approve the will of Kaniu and his giving the land to Kinimaka was unauthorized or not. As infants were bound by the service by publication, Kalakaua was duly served as a defendant to the claim of Kinimaka and bound by the adjudication.

This service by publication may not seem sufficient to us in these days, but the task before the government was a herculean one, to examine and settle titles to all land in the kingdom; and the attempt was being made to do it in two years. It was more important that the work be completed and titles be made certain than that all past wrongs be righted.

In cases like that of the San Francisco fire this court has held that minors who were resident in the jurisdiction and might have been personally served with process were bound by service by publication when unknown to the court and an effort had been made to find all claimants.

American Land Co. v. Zeiss, 219 U. S. 47.

The equitable doctrine of constructive trusts does not make every one a trustee who holds a legal title wrongfully obtained, but follows certain principles grown up in Anglo-Saxon jurisprudence. The title that "exists in conscience though there be none at law" does not include that taken from infants who have been deprived of land through negligence of their guardian or without actual notice, if forms of law have been complied with, and a title obtained by adverse or by lying testimony is good in equity.

In considering whether there is an implied exception to the finality of an award by the Board of Commissioners to Quiet Land Titles the state of the law

at that time should be considered. In the constitution of 1839 and the laws published in 1842 small space is given to fraud and none to equity jurisprudence. The word guardian does not occur. The tenure was feudal and based on labor. One who did not work was liable to lose his land. An infant was a loss to the overlord. It was of advantage to have a sturdy tenant rather than a weak one. Thus, the wrong of taking land from an heir was punished by penalty of paying damages rather than returning the land to the heir. Taking of land from an infant devisee by the widower of a tenant at the suggestion of the King would be less of a wrong.

This is the only instance in history where by one sweeping act, a medieval feudal system, adapted to a people without a written language, has been wiped out of existence and a modern, fee simple tenure substituted. There is unusual reason to treat the awards that created fee simple titles as absolutely final.

While it is true that an equity court is a court of general jurisdiction and has jurisdiction over trusts and frauds, still where the law has explicitly given exclusive jurisdiction over a certain subject matter to a particular court, the court of equity has no jurisdiction over that particular subject matter and in this case the very statute that first created the equity court provided that its jurisdiction should not interfere with that of the Board of Commissioners to Quiet Land Titles. This strengthens the view that the creation of equity courts should not be so retrospectively construed as to give those courts power to review land commission awards on the ground that in the eye of equity the awardee was but

a dry trustee for one who should have received the award.

As the Supreme Court of Hawaii said in the Lewers and Cooke case, 18 Haw. 638:

"If this court, therefore, shall enforce the decree of 1858, or by registering the title of the petitioner, treat the decree as enforceable, it will be the first time in the judicial history of Hawaii that a land commission award shall have been set aside upon any pretext whatever."

Awards have been held conclusive against every form of attack heretofore made on them. Claims of fraud, false testimony, infancy and even the admission of the king that a party had a right to an award have been of no avail.

"Kekiekie was one of those tenants who had duly entered his claim at the Land Commission and subsequently in 1850 received his award and patent, that consequently the plaintiff's title was good against all the world."

Kekiekie v. Dennis, 1 Hawaii 70 (side page 43).

In a case where it was claimed fraud had been practiced on the Board of Commissioners the court said:

"The Land Commission may have decided wrong, but if so, Gill or Kalua, both of whom had notice of the award, could have appealed to the Supreme Court, agreeably to the statute in such case made and provided. In that court they could have shown fraud, want of title, or anything else affecting the case; but it cannot be done here, under the circumstances. If we are to go into these cases anew, treating the awards of the Land Commission and the Supreme Court as nothing, then there is no se-

curity for any man's real estate—no rest for his title —and the whole kingdom will be afloat."

Kukiiahu v. Gill, 1 Hawaii 91 (side page 55).

"The record of the Land Commission was admitted for the purpose of corroborating the evidence of error in the record, or error in the transcript," "not for the purpose of reviewing the decision of the Commission." "The Court regard that as final."

Bishop v. Namakalaa, 2 Hawaii 238, 240.

"The Court regard a Land Commission award as final."

Keelikolani v. Robinson, 2 Hawaii 514, 539.

"The Land Commission with the powers of a Court of Record was competent to judge of its own authority, and whatever it did was final unless reversed or modified by the Supreme Court upon appeal."

ibid, p. 551.

"This mahele was the basis of a title. It was one of the conditions, however, of the mahele, that the title should be confirmed by the award of the Board of Commissioners. This Board was a court of Record and here was adjudication, of which all parties in interest were obliged to take notice. And the date of adverse possession must be from the date of the award."

Kanaina v. Long, 3 Haw. 332, 335.

"But as against the government, a grant cannot be presumed from long possession, in view of the law which required claimants to land to present their claims to the Land Comission for confirmation or rejection."

Kahoomana v. Min. of Interior, 3 Haw. 635, 640.

"When appointed administrator of the estate of his wife Kaunuohua on the 13th of March, 1852, there was an award in his favor for the lands in the complaint described, bearing date September 17, 1851. This was equivalent to a judgment in his favor.

"The plaintiff's counsel, however, argues that there was not an adjudication in favor of Moehonua at all because he was not a claimant before the Land Commission, and no evidence was offered in his favor. The bill alleges that Kaunuohua filed a petition in her lifetime praying that her title in said lands be confirmed by an award; that after her death said award 6450 was issued on her said petition. It is not stated that any new proof was taken after her death, and yet the situation of the property was changed. We are not to assume after this lapse of time that the Land Commission had no authority for issuing the award they actually did issue. It was undoubtedly an award in favor of Moehonua. The failure to record evidence to sustain it does not vitiate it, although if the question were opened it would be provable against it."

Kalakaua v. Keaweamahi, 4 Haw. 579.

Bill in equity to declare a trust.

"The law in this case respecting the examination of proceedings before the Land Commission has been placed by this Court in the cases of *Kukiiahu v. Gill,* 1 Haw. 34, and *Bishop v. Namakalaa,* 2 Haw. 233, on a foundation which cannot be disturbed. Every year which passes increases the force of the reason which demands that the adjudications of the Land Commission be not now re-examined."

Kaai v. Mahuka, 5 Haw. 354.

"In evidence before Land Commission is sentence, 'Claimant admits his brother Kaai to have equal rights.'

"It is urged that the Land Commission was a court of competent jurisdiction, and that the evidence

upon which this judgment was based cannot be introduced to controvert their judgment. Soon after the dissolution of this Commission, the Supreme Court admitted the evidence taken before the Commission to show that the award as recorded was not the same as agreed upon by the Commission, and that the clerk had made an error in recording the judgment of the Commission.

"I cannot go any farther than this. During the twenty-five years that have elapsed since the date of that decision, all the members of the Commission have died, and the reasons grow stronger from day to day why the awards of the Land Commission should be treated as final."

ibid, p. 356.

"The Mahele itself does not give a title. It is a division and of great value because, if confirmed by the Board of Land Commission a complete title is obtained. But it was open to examination, and if the evidence was satisfactory that the Konohiki was entitled to the land according to the principles which governed that Board of Land Commission their award gave a complete title. By the Mahele, His Majesty the King consented that Pahoa should have the land subject to the award of the Land Commission.

"It appears by the whole course of legislation that an award of the Board of Land Commission was necessary to perfect the title until, by the law of 1860, the Minister of the Interior was authorized to grant awards.

"In my view, as Pahoa neglected to perfect his title before the Board of Land Commission, but suffered his claim to be barred, the legal title remained in the government."

Kenoa v. Meek, 6 Haw. 63, 67.

"But the Land Commission was authorized by law to investigate, confirm, or reject all claims to land arising previously to the tenth day of December,

1845, and as the will in this case vested the property at the date of the death of the testator (the 7th of June, 1845) the action of this commission in awarding the lands as mentioned above without the entail to the survivors is conclusive against the right to prove a will now which would divert the property differently than awarded.

"Their action was a judgment of a Court of competent authority upon a matter within its jurisdiction it being a claim for land arising previously to December 10, 1845.

"But the case of *Estate of Kaniu,* 2 Haw. 82, is referred to, by the counsel for the petitioner. In this case Justice Robertson admitted a verbal will to probate made in 1843, and although the land the testator had had been awarded to Kinimaka, and not to the devisee. I cannot believe that the attention of the learned justice was called to this point, or he would not have thus practically set aside an award of the Land Commission of which he was a member."

Estate of Kekauluohi, 6 Haw. 172, 178-9.

"There is a time in the history of every nation not formed by colonization, when, as it emerges from barbarism into civilization, titles to land may be said to have a beginning by positive institution of the people of such a nation."

"The commission was authorized to consider possession of land acquired by oral gift of Kamehameha I, or one of his high chiefs, as sufficient evidence of title to authorize an award therefor to the claimant. This we must consider as the foundation of all titles to land in this Kingdom, except such as come from the King, to any part of his reserved lands, and excepting also the lists of Government and Fort lands reversed.

"This construction put upon the statute, that a failure to present a claim within the prescribed time absolutely barred the claimant by the legislative power of the Kingdom, the King and the

Nobles and the Representatives, and uniformly concurred in and acted upon by successive governments under many reigns following, and to this day, undisturbed by any judicial decisions, we are not at liberty to disregard.

"The statute therefore deprived Lot Kamehameha (on his failure to present his claim to the Commission) of what? Not of this land, for he had no title to it, but only of his right to present a claim for it, which was all the interest he had * * *

" 'The doctrine of any inherent equity creating an exception as to any disability, where the statute of limitation creates none, has been long, and I believe uniformly exploded. General words in the statute must receive a general construction; and if there be no express exception, the Court can create none.'

"This view is decisive of this case. The statute made no exception in favor of infants, and we can make none."

Thurston v. Bishop, 7 Haw. 421, 428.

Appellant cites two cases in an attempt to show exceptions. One, *Laanui v. Puohu,* 2 Haw. 161, is a case where an award was made to a dead man. A contract between his widow and heirs provided that the widow should have the land as her dower and the royal patent was made to the widow. This was not contrary to the award, which had nothing to do with contracts or equities between the widow and children of the awardee.

The other case is *Kaaihue v. Crabbe,* 3 Haw. 768, where an award issued April 1, 1850, to Kalamau, who had February 20, 1850, issued a quit-claim deed of all her title "as well in possession as in expectancy" to John Meek. Appellant claims in its brief that it was "held, the title inured to Meek." Even so, the award would naturally be issued to the applicant and evidence be taken as to rights at date of ap-

plication unless the sale *pendente dite* was brought to the notice of the court. But this point was not argued by either party or referred to by the court. The significance of the dates seems to have been unnoticed by all and the finality of the award is not questioned or referred to. There was no occasion for any argument as to conflict between the deed and the award, as the evidence upholding the genuineness of the deed showed that the awardee had given up possession to the grantee, who had held possession ever since. The case concerns the validity of an unrecorded deed, adverse possession and a tenant's right to dispute his landlord's title.

None of the cases as to equity jurisdiction cited by appellant are in point, as in none of them was there such a tribunal as the Board of Commissioners to Quiet Land Titles, created before the creation of courts of equity or with such powers. They are all courts of people who have long known how to read and write and for centuries had written laws. Hawaii has no law reports prior to the Board of Land Commissioners.

In an equity case involving a judgment of a commissioner to settle claims to land under Mexican land grants brought to declare defendants trustees and compel a conveyance of the legal title this court said:

"Suppose that is so (i. e., that fraud is proved) still it is insisted by the appellants that the decree should be reversed because the decree of the commissioners, as they contend, was final and conclusive between the original claimants. Unquestionably it is a general rule that when jurisdiction is delegated to a tribunal over a subject matter, and its exercise is confined to their discretion, the decision of the mat-

ter, in the absence of fraud, is in general valid and conclusive. Even fraud will not in every case open the judgment or decree to review where the proceeding is not a direct one, but it is not important to enter much into that field of inquiry, as the 15th section of the act provides that the final decrees rendered by the commissioners or by the District or Supreme Court of the United States or any patent to be issued under the act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons."

Meader v. Norton, 11 Wall. 442, 457.

The court derived the right in equity to declare a trust in an award of the commissioner from the express exception in the statute. The strong implication is that if the statute had been like the Hawaiian one the award would have been held final in spite of the very different conditions of Mexico and Hawaii.

Carpentier v. Montgomery, 13 Wall. 480, 495:

"It is true that the fifteenth section of the act declares that the decree of confirmation shall be conclusive between the United States and the claimants only, and shall not affect the interests of third persons. But this was intended to save the rights of third persons not parties to the proceedings, who might have Spanish or Mexican claims independent of or superior to that presented by the claimant, or the *equitable* rights of other parties having rightful claims under the title confirmed."

IN THE CASE OF 1858 NO FRAUD, ACTUAL OR CONSTRUCTIVE, WAS PLEADED OR PROVED.

General allegations of fraud are insufficient.
Greenameyer v. Coate, 212 U. S. 434, 444.
United States v. Arrendondo, 6 Peters 691, 716.

And the facts set out and those proved do not in connection with the laws of the times show fraud.

The fraud rests primarily upon the probate in 1858 of the will of Kaniu. No other probate is alleged. The fraud therefore is created *ex post facto.* There is no claim in the petition of Kalakaua that the oral will was reported to the King and no real fault found in it by the Supreme Judges and no acts by Kinimaka preventing such report are pleaded.

The evidence in the probate proceedings shows that the probate was a setting aside of a decision of the King, the chief justice in 1843, against its probate.

The governor of the Island of Oahu (where the land lies) testified (Record, p. 16) that he wrote to the premier at Lahaina, the capital, informing her of Kaniu's oral will and that Kinimaka went personally to Lahaina to report it(in accordance with the Laws of 1842, Ch. III, Sec. 14, and Ch. XXI, Sec. 8), and that he received a letter from the premier afterwards informing him that the King had given all the property to Kinimaka himself. When he met the premier he informed her that it was not in accordance with the will of Kaniu, and she replied, "Well, the King had done it."

Where court proceedings were not required to be in writing this amounted to a formal report of the premier of the kingdom to the governor of Oahu that the king had refused probate of the will. The

King was chief justice of the Supreme Court (Constitution of 1840 supra) and the Supreme Judges had power to correct wills in which they perceived a real fault (Laws of 1842, Ch. XXI, Sec. 3, supra).

The court in its decisions admitting the will to probate held that an oral will was valid without the approval of the King. The decision virtually sets aside the king's judgment that there was a real fault as erroneous.

Kinimaka might, in 1843, have appealed from the king to the supreme judges sitting in banco on behalf of Kalakaua perhaps. The procedure of early days is not defined in any printed laws or law reports. But his failure to do so was not fraud, and not doing so he acquired a vested right upon the award of the land commission. These facts if fully set out to the Land Commission might not have led to a different award. Perhaps Kinimaka did do this for the failure to record evidence of it by the land commission can not hurt the award (*Kalakaua v. Keaweamahi,* 4 Haw. 579, supra).

In the proceedings in probate there is no mention of any land commission award, either in petition for probate, evidence, decision, judgment or elsewhere in the record (Record, pp. 12-8). The fact that the Board of Commissioners to Quiet Land Titles had adjudicated the title to this land was not considered by the court.

So far as this probate decision may be construed as setting aside any land commission award it has been overruled (*Estate of Kekauluohi,* 6 Haw. 172, 178-179).

But probate of a will does not determine the legal

effect of the will on any property or that the testator owns any property.

Black on Judgments, Sec. 635.

Lewers and Cooke v. Atcherley, 222 U. S. 285, 295.

It follows from the citations supra as to the finality of land commission awards and also the provision in Laws of 1842, Ch. III, Sec. 14 supra that one who wrongfully dispossesses an heir shall own the land upon payment of two-thirds the income for four years (a quasi eminent domain) that the probate of this will after the award to Kinimaka did not affect any real estate that Kaniu may have owned that may have been awarded to Kinimaka.

As the only fraud alleged by Kalakaua rested entirely upon this probate, his whole case falls with it.

THE ENTIRE RECORD NEGATIVES EITHER ACTUAL FRAUD BY KINIMAKA OR ANY CONSTRUCTIVE FRAUD ARISING OUT OF FIDUCIARY RELATIONS.

He did nothing secretly. He reported the oral will in the presence of many chiefs (Record, pp. 16, 23); signing the mahele or partition book in which he as owner gave up interests as chief in many lands and received a release from the king and was recognized as owner (Record, pp. 37-8) was a public act, and also made in presence of one witness to the oral will (Record, p. 15). This was two years after the application for an award of this land. His application to the Board for an award was a public act, and the application ws published, so that all these many chiefs who had heard of the will, all acquaintances and relatives of Kalakaua would know it.

The king's objection to the will may have been erroneous as decided by the judge that admitted the will to probate, but it is inconceivable that Kinimaka in 1843 or 1846 could have doubted the king's right or been acting in anything but good faith. How was he in 1846 to guess that after the death a judge would say that a rejection by the king counted for naught and that when he reported the will to the king it would remain in force, whatever the king said? This was contrary to the feudal ideas.

The king has always been supreme over Hawaiian law. Though a king might limit himself voluntarily in a constitution, yet he could at any time legally abrogate the whole constitution. Thus the constitutitions of 1852, 1864 and 1887, each in turn, abrogated preceding ones and were the act of the sovereign alone, not amendments made in accordance with the preceding constitution. In 1852 the sovereign refers to advice and consent of the Nobles and Representatives, and in 1887 to himself as the representative of the people, by them thereunto duly authorized, but in 1864 there is no such reference. That constitution was "Granted by His Majesty Kamehameha V, by the Grace of God, King of the Hawaiian Islands on the Twentieth Day of August, A. D. 1864."

Kinimaka's application for an award (Record, pp. 39-42) shows that he did in fact claim to be an heir of Kaniu, for one lot is claimed through her, but the one involved in this case is from Liliha (governess of the Island of Oahu).

This indicates an honest claim from Liliha. If fraudulent he would have either claimed all from Kaniu or manufactured false claims for all. The record in Kalakaua's equity suit shows that six

years passed after Kaniu's death before the award (Record, pp. 22, 32) and thirteen years before the suit in equity and that Kinimaka had paid out money for Kalakaua (Record, p. 26). There has been no suit for an accounting as guardian or trustee, and the implication is that Kalakaua had received two-thirds of the income for four years, and that Kinimaka had lawfully acquired Kalakaua's rights by the eminent domain provisions of Laws of 1842, Ch. 3, Sec. 14 supra. There is certainly nothing in the pleadings or evidence to contradict this.

Moreover, there is no finding of constructive fraud or of any facts from which fraud may be deduced in the decree in the old equity case. Fraud must be reasoned out from the bare decree ordering a conveyance to the guardian. But Pai, the widow, is not ordered to release her dower interest, and there is no possible view of the facts which will warrant a failure to make a decree against Pai which will not also negative any fraud by Kinimaka. A decree against the guardian and not against Pai can only have been made arbitrarily without reference to facts or law.

EQUITY HAD NO JURISDICTION BECAUSE KALAKAUA HAD AN ADEQUATE REMEDY AT LAW.

A suit to recover two-thirds of the income of the land for four years with interest would have given him all he was entitled to under the laws prior to the award, and a suit in probate for accounting as a guardian would have compensated him if he could have proved the guardianship.

MOSES KAPAAKEA KINIMAKA WAS NOT A PARTY TO THE EQUITY CASE OF 1858 AND NO ESTOPPEL OF RECORD RESULTS FROM IT AGAINST APPELLEES.

The first requisite of an estoppel by record is that the person estopped must be a party or a privy.

1 Black Judgments, Sec. 219.
23 Cyc. 1237.
Parker v. Spencer, 61 Tex. 155, 161.
George v. Holt, 9 Haw. 47.
Mossman v. Govt., 10 Haw. 421.

The suit in which the decree of 1858 was rendered was against Richard Armstrong, the guardian of Moses Kapaakea Kinimaka, not against the minor himself.

The petition (Record, p. 19) is not entitled, but the prayer is that "Pai and the Guardian of the said children may be summoned."

The summons (Record, p. 20) commanded the marshal to "Summon Pai (w) and Richard Armstrong, Guardian of Kaniu, David Leleo and Kinimaka minors, Defendants, to be and appear before the Honorable Elisha H. Allen."

The answer (Record, p. 21) is entitled, parties being reversed, "PAI & RICHARD ARMSTRONG, Guardians of Kaniu, David Leleo & Kinimaka, Minors vs. DAVID KALAKAUA" and is signed

"PAI
RICHARD ARMSTRONG,
Guardian of Kaniu, David Leleo, Kinimaka Minors
By ASHER B. BATES, Their Solicitor"
(Record, p. 22.)

The clerk's minutes (Record, p. 22) are headed:

"DAVID KALAKAUA
vs.
RICHARD ARMSTRONG, Guardian of Kaniu,
David Leleo and Kinimaka."

The document filed by the plaintiff discontinuing as to some land (Record, p. 26) and the entry of decree (Record, p. 27) are headed:

"DAVID KALAKAUA
vs.
RICHARD ARMSTRONG, Guardian of Kaniu,
David Leleo & Kinimaka,
Minor Children of Kinimaka, Deceased."

The rule is that a decree recites the names of the several parties to the cause who should have the same titles in the decree they have in the bill.
5 Enc. of Pl. and Pr. 1036, 1064.

"The title to the property of the ward does not pass to the guardian. * * * His position is that of an agent or attorney, not that of an assignee or trustee. * * * The general rule that the ward is to be made a party in suits which concern his title is clear and well settled."
Lombard v. Morse, 155 Mass. 137.

"Any decree obtained against a guardian in a suit in which the ward was not joined, would not be conclusive upon him nor enforced against him upon a subsequent bill founded only on such decree against his guardian."
Este v. Strong, 2 Oh. 401, 406.

"This is a bill in equity against the respondent as guardian of Edward Wakefield, a minor. It seeks the enforcement of a trust * * * and to compel a conveyance to the plaintiff of real estate the legal

title to which was in the minor by descent. The minor is not made a party. * * * The infant not being made a party the bill must be dismissed."

Wakefield v. Marr, guardian, 65 Me. 341, 342.

"The bill is filed by Harris as guardian to compel the conveyance of a town lot to his ward. Authorities are hardly required to show that, by the well established rules of chancery law, the bill should have been filed in the name of the ward, by his guardian or next friend. But it is argued that this rule has been changed by the statute which reads: 'Guardians by virtue of their office as such, shall be allowed in all cases to prosecute and defend for their wards.' While this section may give the control of the proceedings to the guardian, it makes no change as to the parties to the suit. As formerly, the proceeding must still be conducted in the names of the parties really interested, as much as if they were adults. Only by making them parties could they be bound by the adjudication."

Hoar v. Harris, 11 Ill. 24, 25.

"It is the infant, and not the next friend, who is the real and proper party. The next friend, by whom the suit is brought on behalf of the infant, is neither technically nor substantially the party, but resembles an attorney, or a guardian *ad litem,* by whom a suit is brought or defended in behalf of another. The suit must be brought in the name of the infant, and not in that of the next friend. *Crandall v. Slaid,* 11 Met. 288; *Guild v. Cranston,* 8 Cush. 506."

Morgan v. Potter, 157 U. S. 195, 198.

This principle has also been adopted by the Supreme Court of Hawaii.

"The statute is (Compiled Laws, p. 444): 'The guardian shall appear for and represent his ward in all legal suits and proceedings, unless another person is appointed for that purpose, as guardian or next friend.'

"In the case at bar, a guardian for the minor had been appointed by the probate court. How, then, should the suit be brought? The purpose of it was to collect rent due for use of the minor's land. It was the suit of the minor, and not that of the guardian. But the minor cannot make a contract with an attorney to bring a suit, and cannot personally bring a suit; therefore, he must act through some one that is his guardian, if he have one, or by some one specially appointed by the court. The suit is nevertheless that of the minor.

"Analogous to this is a suit where the suitor is represented by an attorney in fact.

"All the forms in the books on pleadings correspond with this view. See Chitty's Practical Forms, Chap. 4, 'Actions by and against infants.' 'If the infant be plaintiff the process will be in his name, and not in the name of the guardian or prochein amy.' "

Meek v. Aswan, 7 Haw. 750.

Woerner American Law of Guardianship, Sec. 21, p. 64:

"There is little or no difference between the functions of a next friend and that of a guardian *ad litem,* save that one of these names is usually given when they represent one, and the other side of the litigation; both are officers of the court; they are a species of attorney, whose duty it is to bring the rights of the infant to the notice of the court."

ibid, p. 69:

"Neither the next friend, nor the guardian *ad litem* is a party to the suit; it is carried on in the name of the infant in either case."

See also:

Williams v. Cleaveland, 76 Conn. 426, 431.
Bryant v. Livermore, 20 Minn. 313, 342.
1 Beach Mod. Eq. Pr., Sec. 48, Note 1.

These principles have never been overruled in Ha-

waii, but in this case in the ruling on the demurrer (Record, pp. 45-52), 14 Haw. 651, Judge Perry refused to follow them to their logical conclusion of no estoppel, on the ground that a different practice had been followed in many instances (Record, pp. 49-50), citing six cases at *nisi prius,* and that *stare decisis* forbade the overruling of those *nisi prius* decisions. Judge Frear held that the question was one of error, not jurisdiction and not one of *stare decisis.* He drew no distinction between the question of parties of record and that of service. Judge Galbraith dissented.

These opinions being on different grounds in this case, do not establish a territorial decision on local practice which this court should follow.

Judge Perry's opinion is illogical. If the doctrine of *Meek v. Aswan* supra is correct there can be no estoppel of record. Decisions of inferior courts do not establish any rule of *stare decisis* when contrary to the principle of a supreme court case of the territory that stands unreversed.

THE CASE OF *KALAKAUA V. KINIMAKA* (RECORD, PP. 9-12, 112) IS A DISTINCT CASE FROM THAT OF *KALAKAUA V. PAI AND RICHARD ARMSTRONG, GUARDIAN* (RECORD, PP. 18-27, 113-4), SO NO CLAIM CAN RIGHTLY BE MADE THAT THE MINORS WERE BEFORE THE COURT AS PRIVIES OF KINIMAKA.

That earlier case concerned eleven pieces of land (Record, p. 10) not mentioned in the second, and the second concerned one, a kalo patch in Kaaleo, Oahu (Record, p. 19), not mentioned in the first. Kalakaua's equity is derived in the first from an oral

will and approval by the king; in the second suit from a will probated in 1857, no approval of the king being pleaded.

A suggestion of the death of Kinimaka was made (Record, p. 12) with a prayer that the minors be made parties and a guardian *ad litem* appointed, but this suggestion was never acted upon. To revive a suit an order of court is necessary.

18 Enc. of Pl. & Pr. 1110 j.
10 Enc. of Pl. & Pr. 614.
1 Beach Mod. Eq. Pr., Sec. 488, p. 506.
Day v. Potter, 9 Paige Ch. (N. Y.) 645, 646.
Pickering v. Walcott, 1 Ind. 262, 263.
Aldrich v. Hassenger, 12 Haw. 10.

Service of either the summons or the order of revivor was necessary to bring new parties before the court.

1 Beach Mod. Eq. Pr., Sec. 487.
18 Enc. of Pl. & Pr. 1108, 1109.
10 Enc. of Pl. & Pr. 615.

Mrs. Atcherley does not deserve the stigma of a speculator. She was granddaughter of Kinimaka and received the land by deed from an uncle, the remainderman, for $50.00. Betwen uncle and niece the fact that the consideration was nominal should not raise a sneer at the grantee as a speculator. Neither appellant nor any predecessor in title is shown to have paid a cent for the land. That the remainderman and Mrs. Atcherley are not guilty of laches was held by the Lewers and Cooke case, is not controverted by the decision appealed from, and is settled.

Respectfully submitted,

MARY H. ATCHERLEY,
E. M. WATSON,
LYLE A. DICKEY, *pro se.*

KAPIOLANI ESTATE, LIMITED, *v.* ATCHERLEY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 174. Argued April 30, 1915.—Decided June 14, 1915.

A decree was made in 1855, by the Hawaiian court having jurisdiction, to the effect that one who was guardian of a minor had wrongfully obtained from the Land Commission registration in his own name of property belonging to the minor, and that he, and his heirs claiming the property after his decease, held the property as trustee for the ward, and should convey the same to him; the decree was acquiesced in so far as possession was concerned, but no deed was ever executed, and subsequently those holding under the heirs of the guardian having commenced an ejectment suit relying on the legal title, the grantee of the ward brought this suit to enjoin prosecution of the ejectment suit; meanwhile in a suit between a grantee of the ward and others claiming under the heirs of the guardian, it was held that a title registered by the Land Commission could not be attacked; the record in that suit, however, did not disclose the relations of the guardian and the ward; this court having affirmed that judgment, the Hawaiian courts in this case, while admitting that they had fallen into error in the former decision by reason of not giving full effect to the guardianship relations, followed it because it had been affirmed by this court. *Held* that:

In *Lewers & Cooke* v. *Atcherley*, 222 U. S. 285, the suggestion that the relation of guardian and ward existed had no substantial foundation on the record, and this court followed the decision of the local court; the relationship of guardian and ward having now been cleared up and the record in this case showing that it did exist, the courts of Hawaii should have given full effect to that fact, notwithstanding the affirmance by this court of the prior and contrary decision of the Hawaiian court when it did not appear, and so the judgment is reversed and the case sent back to the Hawaiian court.

Under the law of the Hawaiian Islands as far back as 1846, a guardian could not, through the instrumentality of an award of the Land Commission, obtain a title to the property of his ward which

would be so immune from subsequent attack that the wrong would be without redress.

There is nothing to hinder a court from changing its action on a different view of law, after an interlocutory decree or to hinder a party to the action from availing itself of such change unless the decision has the finality of *res judicata*.

A corporation, grantee of a portion of the grantor's property, is not a privy to a grantee of another portion, and a judgment against the latter in a suit in which the corporation was not a party, although some of its officers as individuals had notice thereof and took some part in the defense, is not *res judicata* if the acts of such officers were, as in this case, merely individual and not authorized by the corporation.

In order to make a judgment against the grantor available to the grantee of the title his covenantor must receive notice of the suit and have an opportunity to defend.

21 Hawaii, 441, reversed.

THE facts, which involve the title to land in Hawaii, are stated in the opinion.

Mr. David L. Withington, with whom *Mr. William R. Castle*, *Mr. W. A. Greenwell* and *Mr. Alfred L. Castle* were on the brief, for appellant:

The judgment of 1858 was right and should be enforced. "A minor on coming of age can obtain relief in equity against a guardian who in fraud of his ward, presents a claim and obtains in his own name an award of title to the minor's land."

The exact point was raised and decided in the equity action in 1858, it was necessarily involved in the probate proceeding in that year, the decision of the Supreme Court of Hawaii on demurrer in 1903 declined to review it, and it is sustained by the present decision.

The equity suit before Chief Justice Allen did not seek to set aside the land commission award, but to obtain its fruits. The jurisdiction had been expressly granted to the Supreme Court by statute before 1858.

The court, before 1858, had declared its jurisdiction in plain terms, and has since consistently maintained such construction of its jurisdiction.

This is in accord with the decisions of this court.

The acts in regard to Mexican land grants in California provided for a decree and patent of similar conclusive effect to a land commission award in Hawaii, and this court has repeatedly held that trust relations are not affected.

The decree in 1858 is based on the ownership of the property by Kalakaua, a minor; that Kinimaka was his guardian, owing him the duty to present the land for award to the land commission; the presentation and obtaining the award to himself; the minor's coming of age, and the obligation of the guardian to account. In other words, it was an equitable action by a minor against his guardian for an accounting upon coming of age.

Kalakaua was the undoubted owner of the property.

Kinimaka was the guardian of Kalakaua and as such had absolute control and management of the ward's property, with the power of disposition.

It was his duty to present the land to the Land Commission for award and his failure to do so forfeited Kalakaua's right.

A guardian is not allowed to set up title against his ward.

The guardian is under an equitable obligation to account.

The ward, in the accounting, can elect to take the property.

The right of the ward is a contractual or *quasi*-contractual right against the guardian, which rights are not affected by a land commission award.

This court should reverse the judgment in accordance with familiar rules of equity and should follow the law of the case decided by the Supreme Court of Hawaii when it was the court of last resort.

This is a matter of local law and custom, in which this court should follow the local courts, which have in this action three times ruled the law with appellant.

The court of the time when these local laws and customs were in force twice so decided between litigants, to whom the parties in this action are privies.

This court should not interfere with the exercise of discretion by the Supreme Court of Hawaii in refusing to open up the decree of 1858 in aid of a speculator, claiming title under a breach of trust by a wrongdoer, where this would result in mischief to innocent parties and is not essential to the equities of the case.

The minor never had his day in court until the actions in 1858.

The Hawaiian court erred in holding that the decision of this court in the *Lewers & Cooke Case* was binding although erroneous. But, if binding, it should be overruled.

Numerous authorities of this and other courts are cited in support of these contentions.

Mr. Lyle A. Dickey, with whom *Mr. E. M. Watson* and *Mrs. Mary H. Atcherly* were on the brief, *pro se:*

The Supreme Court of Hawaii did not err in holding that it must follow a United States Supreme Court decision, though that decision upholds a decision of the lower court on a matter of local law.

There are no facts in this case which give appellant a greater equity than was possessed by its grantee in the former case.

The argument that guardianship was claimed and proved in the ancient equity case and that the resultant fiduciary relationship between Kinimaka and Kalakaua gave a court of equity in 1858 authority to re-investigate the question as to what person had a right to the award and to order the guardian of the holders of the allodial title created by the award to convey it to Kalakaua was

presented both to the Supreme Court of Hawaii and this court in the *Lewers & Cooke Case.*

The rule of the "law of the case" is not involved here.

The court below was also right in following the *Lewers & Cooke Case* because of the peculiar relation of appellant to that case which makes that case binding on appellant because of appellant's laches, present lack of interest in the case and *res judicata.*

The status of the *Lewers & Cooke Case* is that of a prior case because judgment was first reached in it.

Appellant is barred by laches from any standing in equity, and having sold all equitable title in the land to Lewers & Cooke, has no equitable interest in the subject-matter to sustain this suit.

The Lewers & Cooke decree should be followed in this case because it is *res judicata.*

The original tenure of Hawaii from the time Kamehameha first established the monarchy to 1839 was feudal and a despotism. The king and each overlord under him had absolute ownership and control of the land and people under him.

The constitution of 1839 and laws down to establishment of the Board of Commissioners to Quiet Land Titles in 1845 gave protection to interests in land, but those interests were still feudal, largely undefined, and the remedy for wrongful dispossession of an heir was payment of damages, not return of the land.

The awards of the Board of Commissioners to Quiet Land Titles created fee simple titles for the first time; did away with feudal tenure and settled forever all claims to land arising prior to December 10, 1845.

In the case of 1858 no fraud, actual or constructive, was pleaded or proved.

The entire record negatives either actual fraud by Kinimaka or any constructive fraud arising out of fiduciary relations.

Equity had no jurisdiction because Kalakaua had an adequate remedy at law.

Moses Kapaakea Kinimaka was not a party to the equity case of 1858 and no estoppel of record results from it against appellees.

The case of *Kalakaua* v. *Kinimaka* is a distinct case from that of *Kalakaua* v. *Pai and Armstrong, guardian,* so no claim can rightly be made that the minors were before the court as privies of Kinimaka.

Numerous authorities of this and other courts are cited in support of these contentions.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Appeal to review a decree of the Supreme Court of Hawaii which reversed a decree of the circuit judge of the first judicial circuit enjoining the prosecution of an action of ejectment brought by Mary H. Atcherley, one of the appellees, against appellant for the recovery of certain described lands, decreeing that appellant had the equitable title to the lands and that appellees, including Dickey and Watson, who were made parties pending the suit, held the naked legal title thereto as tenants in common, one-half thereof by Mary H. Atcherley and one-quarter thereof by each of the other appellees, as trustees of appellant. The decree required that the appellees execute a conveyance of such title to appellant.

The bill alleges that one David Kalakaua, under and through whom the appellant company (designated hereinafter as complainant) claims, on or about December 29, 1856, litigated his title with the following parties, under whom defendant Atcherley claims title, to-wit: Kinimaka, Pai, his wife, and their children, in the Supreme Court of the Hawaiian Islands, in equity, alleging that Kinimaka held title to the lands in trust and as guardian

of Kalakaua and not otherwise, and praying that he, Kinimaka, be declared trustee of the lands for Kalakaua and be decreed to convey the same in fee to Kalakaua; that summons was duly issued and served on Kinimaka, who, before filing answer died, leaving a will devising the lands to his children, whom he left surviving him, and his widow, Pai; that these facts were suggested to the court and it was prayed that the widow and children be made parties to the suit, and a guardian *ad litem* be appointed for the children, it being alleged that they became trustees of the property in the same manner and under the same trust as Kinimaka.

That subsequently (March 8, 1858) Kalakaua filed a petition for administration upon the estate of one Kaniu, deceased, under whom he claimed title to the lands, and for the appointment of a guardian *ad litem* for the minor children of Kinimaka. That upon the filing of such petition George E. Beckwith, administrator of the estate of Kinimaka, was appointed guardian *ad litem* of the minor children of Kinimaka, and notice was served on him as such administrator and guardian and upon Pai to show cause why letters of administration might not issue to Kalakaua upon the estate of Kaniu, deceased.

That upon proceedings being had a decree was rendered adjudging Kalakaua to be the devisee of Kaniu and directing letters to be issued to him.

That on June 19, 1858, Kalakaua filed a further petition alleging the same facts substantially which he had alleged in the petitions of December 29, 1856, and March 16, 1857, with the additional fact that one Richard Armstrong had been appointed guardian of the minor children of Kinimaka, and prayed that he might be ordered to convey the lands to Kalakaua; and that a summons was duly served upon Armstrong as guardian of the children and upon Pai; that Armstrong and Pai subsequently answered; that evidence was taken, the case heard upon

the merits, and on November 2, 1858, the court duly entered the following decree:

"David Kalakaua against Richard Armstrong, guardian of Kaniu, David Leleo, and Kinimaka, minor children of Kinimaka, deceased. The court did order, adjudge and decree in this matter that Mr. Armstrong, as guardian of Kaniu, David Leleo, and Kinimaka, minor children of Kinimaka, deceased, do convey to David Kalakaua, the plaintiff in this cause, the land named Omulimalo, on the island of Molokai, and the first Apana of land set forth in Royal Patent 1602 filed in this cause."

That it did not appear either from the records of the court or from the registry of deeds in Honolulu that the decree of the court was in fact obeyed but, it is alleged, that after the decree Kalakaua "ceased to be molested in any way by either the widow and heirs aforesaid of said Kinimaka, or by the said Armstrong in their behalf, and retained open, notorious and undisputed possession and dealt with the said land in all ways as his own, and continued to do so until he disposed of said property."

The bill here made "all papers, pleadings and exhibits of whatsoever kind in said equity proceedings" a part of it and asked leave to refer to them as if actually incorporated therein. Then came the following: "And, in this connection, the complainant attaches hereto a copy of the original Land Commission award and royal patent [they were not previously referred to in the bill], and copies of the original record of evidence given before the Land Commission in support of said Land Commission award and royal patent, the same being referred to and made a part of the evidence in said equity proceedings instituted in the years 1856 and 1857 above referred to, which said copies are made a part of this bill."

That the successors in title of Kalakaua (the conveyances being set out) had retained and had been in the same kind of possession and exercised the same disposition

as he. That such possession in Kalakaua and his successors was known to the children of Kinimaka; that they attained their majority respectively in 1867, 1871 and 1877 and at no time did they or any of them assert any claim to the land or deny the rights of Kalakaua or his successors but acquiesced in his and their possession.

The manner by which defendants obtained the title they assert was set out and it was alleged that owing to the failure of Armstrong to obey the decree of the court and convey the interest of the children of Kinimaka as ordered by the court, complainant's required chain of title was incomplete and that the action in ejectment of Mary H. Atcherley, one of the defendants, sought "to take unconscionable advantage of the above-mentioned technical error in the chain of title." A cloud upon the title of complainant was asserted hence to follow and that it would be inequitable to permit her to prosecute her action of ejectment and that as naked trustee of the title she should be required to convey it to appellant.

An injunction, temporary and permanent, was prayed and that Mary H. Atcherley, the defendant, be declared trustee and be required to convey the property to complainant.

Copies of the proceedings referred to in the bill were annexed to it as exhibits. Among these, we have seen, were the award of the Land Commission and the royal title. The latter recites that—

"Whereas the Board of Commissioners to Quiet Land Titles has awarded to Kinimaka by award No. 129 a freehold estate less than allodial in the premises mentioned below, and,

"Whereas, Kinimaka has paid into the government treasury eighty-two and 50/100 Dollars for the government's rights in said land,

"Therefore, by this Royal Patent Kamehameha III . . . shows . . . that he has conveyed and

granted in fee simple to Kinimaka that land at Honolulu on the Island of Oahu with these boundaries . . . It is granted in fee simple to him, his heirs and devisees. . . ."

The lands in suit were part of the lands conveyed.

Mary H. Atcherley, then being sole defendant, demurred to the bill on the ground that it did not set out a cause of action.

By stipulation of the parties, in order to determine the question whether the decree of 1858 was *res adjudicata*, the circuit judge made a *pro forma* ruling sustaining the demurrer to the bill and dismissing it.

The complainant appealed to the Supreme Court of the Territory, it being stipulated that complainant should do so.

The Supreme Court reversed the decree. 14 Hawaii, 651. In its opinion it recited the facts with great fullness, completed the allegations of the bill by the exhibits attached, and then disposed of the contentions as follows:

1. The decree adjudging Kalakaua to be the owner of the land and requiring conveyance of it to be made to him by Armstrong as guardian of the children of Kinimaka was not ambiguous, but it took certainty from the averments of the bill and the record and there could "be no doubt that it was the intention of the court to order the conveyance of the interests of the minors."

2. The minors were bound by the decree notwithstanding "they were not named as parties defendant in the suit." This was decided on the authority of Hawaiian cases and the power of guardians over the estates of their wards established by them and upon the general principle of collateral attacks upon judgments. And specifically replying to the contention that the decree was not binding because of "the lack of service and upon the merits" and that the court should refuse to enforce the decree, it was said:

"It is not contended that the court must in all such cases reëxamine the former proceedings but merely that it may, in its discretion, do so. Assuming that to be so, we decline to retry the old case. The guardian appeared and contested the complainant's claim, presenting in opposition substantially the same views now sought to be urged by the respondent. The ward's interest were not permitted to go by default but were fully defended by counsel. The decree, while not carried out by the execution of a conveyance, was in fact acquiesced in, as appears by the bill, by all concerned and complainant and his successors in interest from that time continuously until about January, 1900, held open, notorious and undisturbed possession of the land. Under the circumstances, and after a lapse of more than forty years, we do not think that the court should examine into the merits of the former proceedings or refuse to enforce the decree for the reasons suggested."

Upon the filing of the mandate of the Supreme Court in the court below Mary H. Atcherley filed an answer in which she admitted many of the allegations of the bill, denied some—among others, the undisturbed possession of the land in Kalakaua and his successors, as alleged, and the inferences from it—asserted the validity of her title, and the staleness of complainant's demand, it having been "brought forty-three years or more than four times the term of the statute of limitations since the alleged date of the alleged decree ordering Richard Armstrong to give a conveyance." That to enforce a conveyance from her without giving her an opportunity to be heard upon the matters set forth in the bill would deprive her of property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

By a supplemental answer she alleged the following, which we state narratively:

Since the filing of the answer the complainant Kapiolani

Estate, Limited, has parted with all of its estate in the land by a deed of a small portion to certain named parties and the balance, with covenants of warranty, to Lewers and Cooke, Limited, a Hawaiian corporation.

June 29, 1906, that corporation brought suit in the Court of Land Registration to register its title to the land conveyed. September 16, 1907, it was decreed that the corporation had a good title which was entitled to registration. The decree was reversed by the Supreme Court of the Territory March 5, 1908, that court holding that the corporation had no title, legal or equitable, to the land. 18 Hawaii, 625. The case was remitted to the Court of Land Registration for further proceedings and that court dismissed the petition of the corporation. The latter appealed from the decision to the Supreme Court of the Territory, which court modified the decree and on March 24, 1909, entered a final decree that the corporation had no title, legal or equitable, to the land. 19 Hawaii, 334. Upon appeal to this court the decision was affirmed. [*Lewers & Cooke, Ltd.*, v. *Atcherley*, 222 U. S. 285.]

The decree of the Supreme Court of Hawaii is in full force and effect and it is alleged that the "proceedings in the Court of Land Registration, Supreme Court of Hawaii and Supreme Court of the United States were upon the merits of the case and the cause of action so finally adjudicated was the same right and cause of action as that on which complainant in this case has founded its bill."

There was a replication to the answer and an amendment to the amended bill, and it appears that Mary H. Atcherley conveyed an undivided half of the property to Lyle A. Dickey and Edward M. Watson, two of the defendants. They were made parties by consent and answered in the case, in effect repeating the answers of their grantor.

It was decreed that (1) the allegations of the bill and replication of complainant were true. (2) The defendants

and each of them were estopped from litigating against or in opposition to the claim of complainant. (3) The defendants held the legal title to the land as tenants in common, one-half by Mary Atcherley and one-fourth by each of the other defendants. (4) Such title and titles were held by the defendants respectively as trustees for complainant and that each of them should be decreed to execute conveyance thereof to complainant, all and singular, the matters appertaining to the title having theretofore been litigated between the predecessors in title of the complainant and defendants respectively, and that the same were *res judicata*. (5) Defendants should be permanently enjoined from further prosecuting that certain action in ejectment then pending on the law side of the court, wherein Mary H. Atcherley was plaintiff and complainant was defendant.

A conveyance was decreed to be made accordingly and in case of default after thirty days the clerk of the court as its commissioner should make such deed. Further prosecution of the action in ejectment was enjoined.

The decree was reversed by the Supreme Court of the Territory.

The opinion is somewhat difficult of condensation. It rapidly reviews the steps in the litigation exhibited in 14 Hawaii, 651; 18 Hawaii, 625; 19 Hawaii, 47 and 334; and 222 U. S. 285. Then this comment was made:

"Notwithstanding the statement made in the Lewers & Cooke case (19 Hawaii, 48) that there had been no reversal of the facts found by the court of land registration, the fact found by that court that Kinimaka 'was the natural guardian of the minor' was not included in the findings of fact certified up by this court on the appeal to the United States Supreme Court. And the fact that the guardianship relation existed, vitally important though it was, seems to have received scant consideration in that case. That Kinimaka was the testamentary guardian of

Kalakaua's property seems to be beyond the range of dispute at this time. If the relation existed in fact a question as to the regularity of the appointment would not prevent the assertion of any rights the ward would otherwise have against the guardian. 'It is not essential that a legal guardianship should exist; the doctrine (constructive fraud) applies wherever the relation subsists in fact.' 2 Pom. Eq. Jur. Sec. 961.

"We are satisfied that this court fell into error in the Lewers & Cooke case in taking the view that the equity suit before Chief Justice Allen constituted an attack on the award of the land commission and that the decree in that suit amounted to a setting aside of the award. None of the prior decisions in this jurisdiction which were cited in support of the view taken are authority for the conclusion reached, as an examination of them will show."

Hawaiian cases were reviewed and the court said:

"The question now presented is whether a minor on coming of age could obtain relief in equity against a guardian who had, in fraud of his ward, presented a claim and obtained in his own name an award from the land commission of title to the minor's land. This question was neither involved nor discussed in any of those cases.

"The case of the guardian of a minor obtaining an award in his own name of land belonging to his ward is analogous to the case of a guardian who purchases land with money belonging to the ward, and, in violation of his fiduciary duty, intentional or otherwise, takes the title in his own name. In such a case it is well settled, equity, regarding the land as being the property of the ward, will declare and enforce a constructive trust in favor of the ward and order the conveyance of the legal title. 3 Pom. Eq. Jur. Secs. 1052, 1058."

After further review of the case and consideration of the rights of Kalakaua, the action and duty of Kinimaka, the character and effect of the proceedings which he had in-

stituted and which were instituted against him by Kalakaua and, after his death, against his devisees, the court declared that certain principles resulted therefrom and that "within these principles, then, the decree of 1858 was not erroneous but right."

The character of the awards of the Land Commission was considered and described and their proper relation to the questions and rights of the parties in the case; and this was said: "If the decree in *Kalakaua* v. *Pai and Armstrong* was right it ought to be enforced. If the decision in the *Lewers & Cooke Case* was correct the present bill should be dismissed, but if it was wrong, in justice to the appellee, it ought not to be followed if it can be avoided.

"Being of the opinion that this court was wrong in the conclusion reached in the *Lewers & Cooke Case*, and that the decree of 1858 was not 'erroneous in a fundamental principle,' and, for the reasons stated in the former opinion in the case at bar, should not be reopened, we should feel inclined to depart from the ruling made in the *Lewers & Cooke Case* were we not bound by it because of its having been affirmed by the United States Supreme Court.

* * * * * * * *

"It makes no difference that in making that decision the Supreme Court followed the opinion of this court upon a matter of local law (222 U. S. 294), and that we now believe that that opinion was not well founded. If the former ruling is to be reversed the reversal is to be made by that court and not this. The most that we can do now is to respectfully point out wherein, in our judgment, the former opinion was wrong. This we have done, believing it was our duty to do it, and with this our duty in the premises ends."

We have been at pains to recite the pleadings in the case, the steps in the litigation they detail, and the ruling and comments of the Supreme Court in order to bring the factors of judgment under review in proper connection

and to estimate the constraint the court deemed that it was under to follow the decision of this court in the *Lewers & Cooke Case*, and whether the court was justified in its view of that case.

The case at bar easily resolves itself into a few simple facts and principles which may be summarized from the pleadings and findings of fact. Kaniu, whose adopted son Kalakaua was, on the day of her death, by oral will and according to the custom of the country, appointed him her heir and left him all of her property. Kinimaka was Kalakaua's guardian, and, at a session of the Board of Land Commissioners, procured the land to be awarded to himself. Then followed litigation—commenced by Kalakaua, to declare Kinimaka his trustee of the title—which continued after the latter's death against his children, properly represented, and his widow, which resulted in the decree (November 2, 1858) establishing Kalakaua's title to the land.

The decree was not complied with as directed but was in effect obeyed, and Kalakaua retained possession of the land and he and his successors have ever since continued in the open possession of it, of which possession the children of Kinimaka were aware and at no time asserted any claim to the lands or denied the rights of Kalakaua and his successors thereto, but at all times acquiesced in the possession of Kalakaua and his successors in title.

Then came the action of ejectment by defendant Atcherley and this suit to enjoin its prosecution.

The bill was dismissed upon demurrer and the case carried to the Supreme Court of Hawaii, which reversed the decree.

Pending the suit the complainant transferred its interest by warranty deed to Lewers & Cooke, Limited. The latter instituted suit in the Court of Land Registration to register its title, and it was decreed by that court that it had a good title which was entitled to be registered. The

decree was reversed by the Supreme Court of Hawaii and subsequently this court affirmed the judgment of the Supreme Court.

The determining proposition in the case (*Lewers & Cooke Case*) was that the award of the Land Commission was "conclusive against every form of attack" except by appeal by a party who had presented his claims to the Board. The court considered it immaterial from whom Kinimaka received the lands or whether he was guilty of actual fraud or had an honest belief in his title. And it was said: "The objection to the decree of 1858 appears to go to the jurisdiction of the court over the subject matter, for the Land Commission's award was the final decision of a court of record which was the only court of competent jurisdiction to decide claims to land accruing prior to its establishment, and its decision could not be attacked except by appeal provided by law." But the court further said that even if the objection did not go to the jurisdiction of the court, the result would be the same because of the finality of the Land Commission's award. 18 Hawaii, 625, 638, 639. See also 19 Hawaii, 47, 334.

The suit in the Court of Land Registration and the action of the courts thereunder were set up in the present suit as *res judicata*. The trial court decided against the defense and other defenses, and decreed the relief prayed by complainant. The decree was reversed by the Supreme Court.

We have given excerpts from the opinion of the court showing the grounds of its action. It will be observed that the court frankly declared that it had fallen into error in the *Lewers & Cooke Case* by deciding that the equity suit in which the decree of 1858 in favor of Kalakaua was rendered was an attack on the award of the Land Commission and that the decree amounted to a setting aside of the award, but felt that it was its duty to adhere to the decision as it had been affirmed by this court, and, explaining

our affirmance, said that the "vitally important" fact that Kinimaka "was the natural guardian of the minor [Kalakaua] was not included in the findings of fact certified up." And the court (Supreme Court of Hawaii) declared: "That Kinimaka was the testamentary guardian of Kalakaua's property seems to be beyond the range of dispute at this time." This relationship necessarily was the important fact. Without it Kalakaua had no claim of title; with it his right and the right of complainant as his successor are established and the decree of 1858 establishing his title was correct and the decree in the *Lewers & Cooke Case* erroneous.

But defendants say, granting the latter decree was erroneous, the decree of 1858 was also erroneous, and that the case then presents the opposition of one erroneous judgment to another and the last should prevail. And to establish that the decree of 1858 was erroneous they enter into a discussion of the laws of Hawaii, the consideration of the principles upon which the Hawaiian Monarchy was established in 1845–7, the abolition of the old feudal tenures of land, the creation of a court (the Board of Land Commissioners) to quiet land titles, the awards of which were to be final, and the foundation of fee simple titles to the Kingdom. But the contentions thus presented have intricate character, and can only have clear comprehension in local experience and understanding and are best determined by local interpretation and the decisions of the courts "on the spot"; and this we recognized when we affirmed the decree in the *Lewers & Cooke Case*. The powers of the Land Commission, we said, "involve obscure local history concerning a time when the forms of our law were just beginning to superimpose themselves upon the customs of the islanders. Such customs are likely to be distorted when transmitted into English legal speech."

And such consideration and defense moved or tended to move to the decision in the case. A reference, it is true,

was made to the contention that Kinimaka was guardian of Kalakaua, but the fact was dismissed as being a suggestion having no substantial foundation, and also, again deferring to the local judgments, it was said of the suggestion that "it would be going very far to apply the refined rules of the English Chancery concerning fiduciary duties to the relations between two Sandwich islanders in 1846 on the strength of such a fact."

This relationship has since been cleared up and given definite obligations and duties, and even in 1846 under the law of the islands a guardian could not through the instrumentality of an award of the Land Commission obtain a title to the property of his ward which was immune from subsequent attack and the wrong of it be without redress. The fact of guardianship being established, and such being its legal consequences under the law of Hawaii, according to the latest decision of the Supreme Court of Hawaii, it would be going far to say that a decision was intended to be made against it by the comment which we have mentioned, or by the other comments in the opinion.

For instance, the present case was referred to as pending and it was said that as it had not passed to a final decree there was nothing in the form of action of the court to hinder the court from adopting the principle laid down, even though it thereby should overrule an interlocutory decision previously reached. And we may add that there was nothing to hinder the court from changing its action, which it did, we have seen, on a different view of the law, or the complainant from availing itself of such change, unless indeed the first decision had the finality of *res judicata*.

This is contended, it being urged that the decision of the Land Commission had such binding effect as well on complainant as on Lewers & Cooke, Limited. The contention is based on the following findings of fact:

"In the suit of Lewers & Cooke, Limited, referred to in

these findings, C. W. Ashford, then vice-president of Kapiolani Estate, Limited, and now its counsel in this case, appeared at the trial in the Court of Land Registration and assisted counsel for Lewers & Cooke, Limited, in the conduct of the case by examining three witnesses, and did this at the request of John F. Colburn, who was the treasurer of Kapiolani Estate, Limited, and the officer of Kapiolani Estate, Limited, who in the regular course of business employed attorneys for it. Said John F. Colburn was a witness on behalf of Lewers & Cooke, Limited, at that trial.

"Messrs. Kinney, Marx, Prosser & Anderson, while attorneys for Kapiolani Estate, Limited, in this case, were retained by Kapiolani Estate, Limited, through John F. Colburn, its treasurer, to appear as counsel for Lewers & Cooke, Limited, at two hearings before the Supreme Court of Hawaii subsequent to the final decision, and so appeared, and also, on such retainer, signed the assignment of errors upon appeal from the Supreme Court of Hawaii by Lewers & Cooke, Limited, to the Supreme Court of the United States. The Kapiolani Estate, Limited, was not, however, named as a party to said suit of Lewers & Cooke, Limited, and its counsel took no further part by its direction in the proceedings."

In passing on the contention the Supreme Court of Hawaii said: "Counsel for appellants [appellees here] contend that under the decree in the *Lewers & Cooke Case* the whole matter is *res judicata*. But as the appellee [appellant here] was not a party to that case and is not a privy of Lewers & Cooke, Limited, the ground is untenable." As to the last proposition, that is, that complainant was not a privy of Lewers & Cooke, Limited, the view of the court seems to be sustained by *Wood* v. *Davis*, 7 Cranch, 271, and *Cadwallader* v. *Harris*, 76 Illinois, 370. The first proposition is one of fact. There was a distinct issue upon the fact and the conclusion of the court was

virtually a decision upon the issue that the acts described were not authorized by the complainant corporation but were individual. And we may say it is disputable besides if they constituted an appearance of the complainant. *Schræder* v. *Lohrman*, 26 Minnesota, 87.

The principle invoked by defendants is that one who warrants a title is concluded by a judgment against the title in a suit brought against his grantee, even when the title is aggressively used. *Andrews* v. *Denison*, 16 N. H. 469. But in favor of whom and under what conditions? In favor of the grantee undoubtedly when he brings suit on his covenant against his vendor. But will it be available in favor of the successful assailant of the title? *Wood* v. *Davis* and *Cadawallader* v. *Harris*, *supra*, are authority against the proposition.

But, granting this is disputable, and cases may be cited the other way, it is well established that in order to make the judgment available even to the grantee of the title his covenantor must receive notice of the suit and an opportunity to defend it. Such notice was not proven in this case. We certainly cannot assume that notice was given against the decision of the Supreme Court virtually to the contrary, accepting, indeed, the finding of the trial court. The trial court, as we have seen, found that the allegations of fact contained in complainant's bill of complaint, as finally amended herein, and in its said replication, were true. The replication contained a denial of the averment of the supplemental answer that complainant had notice of the proceedings in the Court of Land Registration, the Supreme Court of Hawaii or the Supreme Court of the United States, though it admitted "that certain of its officers and directors in their capacity as individuals (but not in their capacity as such officers or directors of said complainant corporation) were aware of the pendency of said proceedings."

Decree reversed and cause remanded for further proceedings in accordance with this opinion.